92-76

(1)

Supreme Court, U.S.
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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER 1991 TERM

INDUSTRIA PANIFICADORA, S.A., INMOBILIARIA SANTA ANA, S.A., AND FX VIDEO, S.A., (AND CONTINUED INSIDE),

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Douglas B. McFadden
(Counsel of Record)
James A. Kline, IV
McFadden, Evans & Sill
1627 Eye Street, N.W.
Suite 810
Washington, D.C. 20006
(202) 293-0700

Attorneys for Petitioners

Of Counsel:

J. Michael Sara
Grove Place, Third Floor
2964 Aviation Avenue
Miami, Florida 33133
(305) 441-1627

90

QUESTIONS PRESENTED

1. Whether the violation of article 43 of the Annexed Regulations to the Hague Convention IV of 1907, by the United States military forces in Panama in December 1989, gives rise to a private cause of action where the Republic of Panama has requested the United States courts to resolve the claims of its citizens.

2. Whether the violation of article 43 of the Annexed Regulations to the Hague Convention IV of 1907, by United States military forces in Panama in December, 1989, gives rise to a cause of action under the Federal Tort Claims Act.

3. Whether the separation of powers doctrine embodied in the Constitution precludes the courts from assuming jurisdiction over the violation of the Hague Convention IV of 1907 by United States military forces in Panama.

   a. Whether the Courts' powers under article III, § 2 of the United States Constitution, relating to treaties, is limited by article II, § 2 of the Constitution regarding the President's power as Commander-in-Chief of the military.

4. Whether the Court of Appeals erred in refusing to consider two Diplomatic Notes from the Republic of Panama to the United States.

5. Whether the Court of Appeals erred in considering the appeals on motion without granting petitioners full briefing and argument under the Federal Rules of Appellate Procedure.

PARTIES TO THE PROCEEDINGS BELOW AND CORPORATE DISCLOSURE STATEMENT

All appellants in the Court below are petitioners herein.

The parties to the proceeding in Case No. 91-5147 in the Court of Appeals for the District of Columbia Circuit were:

Industria Panificadora, S.A., Appellant
Inmobiliaria Santa Ana, S.A., Appellant
FX Video, S.A., Appellant
Lindo & Maduro, S.A., Intervenor
Cia. Panamena de Aceites, S.A., Intervenor
Epsilon, S.A., Intervenor
Distribuidora el Chorro, S.A., Intervenor
Distribuidora Catun, S.A., Intervenor
Administradora de Industrias y Comercio, S.A., Intervenor
Distribuidora Las Mendozas, S.A., Intervenor
Distribuidora Premier, S.A., Intervenor
Torneria Especializada, S.A., Intervenor
Terminales Panama, S.A., Intervenor
Ricardo Perez, S.A., Intervenor
Dynamos Corporation, S.A., Intervenor
Corporation Financiera de Equipo, S.A., Intervenor
Toyota Rent A Car, S.A., Intervenor
Panama Bond Corporation, S.A., Intervenor
Hot Shop, S.A., Intervenor
Diacor, S.A., Intervenor
Cemali, S.A., Intervenor
Cala, S.A., Intervenor
Espanola, S.A., Intervenor
Amelia, S.A., Intervenor
Medic, S.A., Intervenor
Cesar Arrocha Graell & Co., S.A., Intervenor
Productos Superiores, S.A., Intervenor
Abernathy, S.A., Intervenor
Clamps, S.A., Intervenor
Supro Mundial, S.A., Intervenor
Vulcapan, S.A., Intervenor
Cencal, S.A., Intervenor
Super Colmar, S.A., Intervenor

PARTIES TO THE PROCEEDINGS BELOW AND CORPORATE DISCLOSURE STATEMENT *(Continued)*

Super Mercado Monte Oscuro, S.A., Intervenor
Super Deposito, S.A., Intervenor
Meso, S.A., Intervenor
Super Dorado, S.A., Intervenor
Importadora Ricamar, S.A., Intervenor
Panaderia y Dulceria Ba Sabrosita 99, S.A., Intervenor
Orosi, S.A., Intervenor
Granos Del Nilo, S.A., Intervenor
Parmacia Mejor Salud, S.A., Intervenor
Parmacia Mejor Salud #1, S.A., Intervenor
Parmacia Mejor Salud #3, S.A., Intervenor
H. Tzanetatos, Inc., Intervenor
Proveedora Universal, S.A., Intervenor
Inmobiliaria La Rivera, S.A., Intervenor
Lavery Panama, S.A., Intervenor
Blue Ribbon Products, S.A., Intervenor
Inmobiliaria Argo, S.A., Intervenor
Rodelag, S.A., Intervenor
Rodelag Lacal, S.A., Intervenor
Rodelag Otros, S.A., Intervenor
Oficina Universal, S.A., Intervenor
Llantas, S.A., Intervenor
Rodelag David, S.A., Intervenor
Gerencia y Administracion De Computo, S.A., Intervenor
Gerencia y Administracion, Intervenor
Gerencia y Administracion de Creditos y Cobros, S.A., Intervenor
Centro De Distribucion, S.A., Intervenor
Servicios Agroquimicos, S.A., Intervenor
Central Agricola, S.A., Intervenor
United States of America, Appellee

The parties to the proceeding in Case No. 91-5139 in the Court of Appeals for the District of Columbia Circuit were:

Distribuidora Comercial Vicky, S.A., Appellant
Cosmos 2000, S.A., Appellant
Lanatex, S.A., Appellant

PARTIES TO THE PROCEEDINGS BELOW AND CORPORATE DISCLOSURE STATEMENT *(Continued)*

Futuro International, S.A., Appellant
El Chisme, S.A., Appellant
Los Preferidos, Alyejo, S.A., Appellant
Textimoda, S.A., Appellant
Tip Tops, S.A., Appellant
Yaafar International, S.A., Appellant
Almacen El Fantastico, S.A., Appellant
Exportadora Silvania, S.A., Appellant
Importadora Universal, S.A., Appellant
El Mundo de la Fantasia, S.A., Appellant
Yalal International, S.A., Appellant
Juana La Cubana, S.A., Appellant
I.L. Maduro Jr., Zona Libre, S.A., Appellant
Leon Import, S.A., Appellant
United States of America, Appellee

The parties to the proceeding in Case No. 91-5144 in the Court of Appeals for the District of Columbia Circuit were:

Victoria Enterprise, S.A., Appellant
Importadora Samir, S.A., Appellant
Distribuidora Refrinova, S.A., Appellant
Muebleria La Reina, S.A., Appellant
Sonneti International, S.A., Appellant
Almacen El Relampago, S.A., Appellant
Ziad, S.A., Appellant
United States of America, Appellee

The parties to the proceeding in Case No. 91-5145 in the Court of Appeals for the District of Columbia Circuit were:

Rafbar, S.A., Appellant
Hassal, S.A., Appellant
Raclem, S.A., Appellant
A. Diaz, S.A., Appellant
La Casa Del Descuento El Dorado, S.A., Appellant
La Casa Del Descuento Via España, S.A., Appellant

PARTIES TO THE PROCEEDINGS BELOW AND CORPORATE DISCLOSURE STATEMENT *(Continued)*

B.F.G. Panama, S.A., Appellant
E. Don Co Panama, S.A., Appellant
United States of America, Appellee

The parties to the proceeding in Case No. 91-5146 in the Court of Appeals for the District of Columbia Circuit were:

Centro Marino, S.A., Appellant
C.O.N.A.U.T.O., Appellant
Tiboli Latinoamericana, S.A., Appellant
Confecciones Panameñas, S.A., Appellant
Corporacion Serena, S.A. (Benetton), Appellant
Casa de los Casimires, S.A., Appellant
Almacen Madison/Jordan Star, S.A., Appellant
Electro Angeli, S.A., Appellant
Motores Colpan, S.A., Appellant
Almacen Miami Shop/OPI International, Inc., S.A., Appellant
Difusiones De Fabricas, S.A., Appellant
Alsaf Inmobiliaria, S.A., Appellant
Mercurio, S.A., Appellant
Ravid Panama, Appellant
New York Co. International, Appellant
Supermercados El Fuerte, Appellant
Amele y/o La Futurista, Appellant
Cafeteria Florida, Appellant
Aquasport, S.A., Appellant
Rem, S.A., Appellant
Remsport, S.A., Appellant
Muebleria Ancon, S.A., Appellant
United States of America, Appellee

The parties to the proceeding in Case No. 91-5148 in the Court of Appeals for the District of Columbia Circuit were:

Bonmark, S.A. (Audio Foto Lafayette), Appellant
Ganesh Investments, S.A., Appellant

PARTIES TO THE PROCEEDINGS BELOW AND CORPORATE DISCLOSURE STATEMENT *(Continued)*

Arsu, S.A., Appellant
Samsung Electronics, Panama, S.A., Appellant
Inversiones Daya, S.A., Appellant
Casa Egeo, S.A., Appellant
Menashe Hermanos, S.A., Appellant
Specific, S.A. (Almacen Malboro), Appellant
Sergio Castelli International Corp., Appellant
United States of America, Appellee

The parties to the proceeding in Case No. 91-5149 in the Court of Appeals for the District of Columbia Circuit were:

Vida Panama, S.A., Appellant
Corporacion De Almacenaje, S.A., Appellant
United States of America, Appellee

The parties to the proceeding in Case No. 91-5150 in the Court of Appeals for the District of Columbia Circuit were:

Panamuebles, S.A. (Muebleria Panama), Appellant
Rejov Colon, S.A. (Foto Electronico), Appellant
Vegel, S.A. (Palacio Electronico), Appellant
Cine Mundo Electronico, S.A., Appellant
Fotokina, S.A., Appellant
Grupo Panafoto, Appellant
Panafoto Internacional, S.A., Appellant
Estrella del Este, S.A., Appellant
Panafoto, S.A., Appellant
Videofoto, S.A., Appellant
Centro Tecnico Internacional, S.A., Appellant
Panafoto Zona Libre, S.A. (Colon), Appellant
Audiotek, S.A., Appellant
Sound Music, Inc., Appellant
Comercial Electronico, S.A., Appellant
Camara Center, S.A., Appellant
United States of America, Appellee

PARTIES TO THE PROCEEDINGS BELOW AND CORPORATE DISCLOSURE STATEMENT *(Continued)*

The parties to the proceeding in Case No. 91-5151 in the Court of Appeals for the District of Columbia Circuit were:

Palacio Musical, S.A., Appellant
Grupo Attie, Appellant
El Meson Del Prado, S.A., Appellant
E.N.S.A., S.A. (Ensambladora Nacional, S.A.), Appellant
P.E.N.S.A. (Productos Extranjeros y Nacionales, S.A.), Appellant
Toi, S.A., Appellant
Fabrica Internacional de Calzados, S.A., Appellant
Audio Foto Internacional, S.A., Appellant
Calzados Samba, S.A. (Calzados Soberano), Appellant
Distribuidora Dei Pacifico, S.A., Appellant
Comercial Rali, S.A., Appellant
Inversiones Supersa, S.A./Almacen Supersonico, Appellant
Filatelia Panama, S.A., Appellant
Empresa Tagarapulos, S.A., Appellant
Grupo Selecta, Appellant
Electronicos Unidos Internacional, S.A., Appellant
Grupo Tambor, Appellant
Telas Twiggy, S.A., Appellant
Jovi, S.A., Appellant
Joyeria y Muebleria La Española, S.A., Appellant
Empresa Perez Fernandez (Muebleria Benito), Appellant
Inversiones Fernandez, S.A. (Almacen El Billon), Appellant
Fabrica De Muebles Fernandez and Fernandez, Appellant
United States of America, Appellee

Pursuant to Supreme Court Rule 29.1, petitioners, appellants below, state that they have no parent companies which are not parties hereto, or subsidiaries which are not wholly-owned. An exception is petitioner Corporacion de Almacena je, S.A. (No. 91-5149), which is wholly-owned by Edificios Julia, which has not issued any shares to the public. Another exception is petitioner Samsung Electronics, Panama, S.A. (No. 91-5148), which is a subsidiary of Samsung Electronics (Seoul, Korea).

TABLE OF CONTENTS OF PETITION

	Page
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDINGS BELOW AND CORPORATE DISCLOSURE STATEMENT	ii
TABLE OF CONTENTS OF PETITION	viii
TABLE OF CONTENTS OF APPENDIX	viii
TABLE OF AUTHORITIES	x
OPINIONS BELOW	1
JURISDICTIONAL STATEMENT	2
CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED	2
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE WRIT	6
CONCLUSION	29

TABLE OF CONTENTS OF APPENDIX

Opinion of the Court of Appeals in No. 91-5147, dated March 6, 1992	A1
Order of the Court of Appeals, dated March 6, 1992, granting motion for summary affirmance, dismissing as moot motion to include Diplomatic Note in the record, consolidating cases, and ordering parties to show cause	A4
Order of the Court of Appeals in 91-5139 and consolidated cases, dated June 9, 1992	A8
Dismissal Order of the District Court in *Industria Panificadora, S.A., et al. v. U.S.*, dated April 30, 1991	A10
Dismissal Order of the District Court in *Distribuidora Comercial Vicky, S.A., et al. v. U.S.*, dated April 30, 1991	A11
Opinion of the District Court, dated April 30, 1991	A12

TABLE OF CONTENTS OF APPENDIX—*(Continued)*

	Page
Order of the Court of Appeals in No. 91-5147, dated August 16, 1991, holding cases in abeyance and denying motion to exceed page limits	A24
Order of the Court of Appeals, dated March 6, 1992, dismissing as moot motion to include Second Diplomatic Note in the record	A26
Opinion of the Court of Appeals denying rehearing in No. 91-5147, dated April 15, 1992	A28
U.S. Const., art. II, § 2	A29
U.S. Const., art. III, § 2	A29
U.S. Const., art. VI, cl. 2	A29
Hague Convention IV, 1907, art. 3, 36 Stat. 2277, 2290	A29
Hague Convention IV, 1907, Annexed Regulations, art. 42, 36 Stat. 2277, 2306	A30
Hague Convention IV, 1907, Annexed Regulations, art. 43, 36 Stat. 2277, 2306	A30
28 U.S.C. § 1346(b) (1976)	A30
28 U.S.C. § 1350 (1976)	A30
28 U.S.C. § 2674 (1991)	A30
28 U.S.C. § 2680 (1990)	A31
Diplomatic Note No. 678 from the Government of Panama to the Government of the United States, dated August 19, 1991	A32
English Translation of Diplomatic Note No. 678	A34
Diplomatic Note No. 050 from the Government of Panama to the Government of the United States, dated January 21, 1992	A36
English Translation of Diplomatic Note No. 050	A39
Amended Complaint (Ct. Apps. No. 91-5147), dated September 6, 1990	A42

TABLE OF AUTHORITIES

Cases	*Page(s)*
Allen v. U.S., 816 F.2d 1417 (10th Cir. 1987)	19
Austin v. Seligman, 18 F. 519 (2d Cir. 1893)	10
Baker v. Carr, 369 U.S. 186 (1962)	25, 26
Beattie v. United States, 756 F.2d 91 (D.C. Cir. 1984)	19, 20, 21
Berkovitz v. U.S., 486 U.S. 531 (1988)	16, 17, 19
Boyle v. United Technologies, 487 U.S. 500 (1988)	16
Bronson v. United States, 436 F. Supp. 908 (E.D. Pa. 1978)	21
Coplin v. U.S., 761 F.2d 688 (Fed. Cir. 1985)	12
Dalehite v. United States, 346 U.S. 15 (1953)	16, 17
Dreyfus v. Von Finch, 534 F.2d 24 (2d Cir.), *cert. den.*, 429 U.S. 835 (1976)	13
Factor v. Laubenheimer, 290 U.S. 276 (1933)	8, 12
Gerace v. Liberty Mutual Insurance Co., 264 F. Supp. 95 (D.D.C. 1966)	15
Glanzer v. Shepard, 233 N.Y. 236 (1922)	15
Goldstar (Panama), S.A., et al. v. United States, No. 91-2229 (4th Cir., June 16, 1992)	6
Indian Towing Company v. United States, 350 U.S. 61 (1955)	14
Industria Panificadora, S.A., et al. v. United States, 763 F. Supp. 1154 (D.D.C. 1991), *aff'd* 957 F.2d 886 (D.C. Cir. 1992)	3
In Matter of Yamashita, 327 U.S. 1 (1946)	7, 13, 27
In Re "Agent Orange" Product Liability Litigation, 580 F. Supp. 1242 (E.D.N.Y. 1984)	21, 22
In Re Paris Air Crash of March 3, 1974, 399 F. Supp. 732 (C.D. Cal. 1975)	21

TABLE OF AUTHORITIES—*(Continued)*

Cases	*Page(s)*
Jones v. United States, 137 U.S. 202 (1890)	12
Leaf v. United States, 588 F.2d 733 (9th Cir. 1978)	21
MacLeod v. U.S., 229 U.S. 416 (1913)	23
Marbury v. Madison, 1 Cranch 137 (1803)	25
Monarch Ins. Co., v. District of Columbia, 353 F. Supp. 1249 (D.D.C. 1973), *aff'd*, 497 F.2d 684 (D.C. Cir.), *cert. den.*, 419 U.S. 1021 (1974)	18
Ohio Casualty Ins. Co. v. Beckwith, 74 F.2d 75 (5th Cir. 1925)	10
Pennsylvania Cement Co. v. Bradley Const. Co., 7 F.2d 822 (2d Cir. 1925)	10
People v. Suburban R. Co., 178 Ill. 594, 53 N.E. 349 (1899)	10
Powell v. McCormick, 395 U.S. 486 (1969)	26
Rayonier, Inc. v. United States, 352 U.S. 315 (1957)	14
Red Lake Band of Chippewa Indians v. U.S., 800 F.2d 1187 (D.C. Cir. 1986)	18
Remeikis v. Boss & Phelps, Inc. 419 A.2d 986 (App. D.C. 1980)	15
Roberts v. United States, 498 F.2d 520 (9th Cir.), *cert. den.*, 419 U.S. 1070 (1974)	21
Sami v. United States, 617 F.2d 755 (D.C. Cir. 1979)	18, 20, 21
Security National Bank v. Lish, 311 A.2d 833 (App. D.C. 1973)	15
Skeels v. United States, 72 F. Supp. 372 (W.D. La. 1947)	22
Sumitomo Shoji America, Inc. v. Avagliano, 457 U.S. 176 (1982)	12, 13
Trans World Airlines v. Franklin Mint Corp., 466 U.S. 243 (1984)	8

TABLE OF AUTHORITIES—*(Continued)*

Cases	*Page(s)*
United States v. Gaubert, — U.S. —, 111 S. Ct. 1267 (1991)	16, 17
United States v. Muniz, 374 U.S. 150 (1963)	14
United States v. Reynes, 50 U.S. (9 How.) 127 (1850)	12
United States v. Rice, 4 Wheat 246 (1819)	8
United States v. Schooner Peggy, 1 Cranch 103 (1940)	9, 24, 29
United States v. Spelar, 338 U.S. 217 (1940)	20
United States v. Varig Airlines, 467 U.S. 797 (1984)	16
Vandergrift v. United States, 500 F. Supp. 229 (E.D. Va. 1978)	15
Ware v. Jones, 3 Dall. 199 (1796)	23
Youngtown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952)	27, 28
Constitution	
U.S. Const., art. II, § 2	2, 24
U.S. Const., art. III, § 2	2, 23, 24, 26, 27
U.S. Const., art. VI, cl. 2	2
Statutes	
28 U.S.C. § 1254(1) (1992)	2
28 U.S.C. § 1346(b) (1976)	2, 3, 14, 16
28 U.S.C. § 1350 (1976)	2, 13
28 U.S.C. § 2671 (1992)	2, 14
28 U.S.C. § 2674 (1991)	2, 14

TABLE OF AUTHORITIES—*(Continued)*

Statutes	*Page(s)*
28 U.S.C. § 2680 (1990)	2, 14, 16, 17, 21
Treaties	
Hague Convention IV, 1907, art. 3, 36 Stat. 2277, 2290	2, 6, 13, 19
Hague Convention IV, 1907, Annexed Regulations, art. 42, 36 Stat. 2277, 2306	2
Hague Convention IV, 1907, Annexed Regulations, art. 43, 36 Stat. 2277, 2306	2, 6, 8, 15, 17, 19, 27
Other	
1 Bevans 631	13
Declaration of Independence (U.S. 1776)	26
1 Hackworth, *Digest of International Law* 156 (1940)	7
III Hyde, *International Law* 1876 (Little, Brown & Company, 2d ed. 1947)	7
2 Jayson, *Handling Federal Tort Claims* § 262 (1989)	21
Law Among Nations 665 (MacMillan Publishing, 3d ed. 1976)	6
The Federal Tort Claims Act, 56 Yale L.J. 534 (1947)	21
The Federalist No. 64 (J. Jay) (New York Packet, March 7, 1788)	2, 28
The Federalist No. 69 (A. Hamilton) (New York Packet, March 18, 1788)	24
The Federalist No. 80 (A. Hamilton) (McLean ed. 1788)	23

TABLE OF AUTHORITIES—*(Continued)*

Other	*Page(s)*
The New York Times, p. A20, December 21, 1989 . . .	4
The New York Times, p. A1, December 22, 1989 . . .	4
The Washington Post, p. A1, December 21, 1989 . . .	4
The Washington Post, p. A31, December 22, 1989 . . .	4
U.S. Army Field Manual FM 27-10, *The Law of Land Warfare* § 355 (1956)	7
U.S. Army Field Manual 27-10, *The Law of Land Warfare* § 358 (1956)	7
1 Whiteman, *Digest of International Law* 970 (1963)	7

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER 1991 TERM

INDUSTRIA PANIFICADORA, S.A., INMOBILIARIA SANTA ANA, S.A., AND FX VIDEO, S.A., *et al.*,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Petitioners pray that a writ of *certiorari* issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in Case No. 91-5147 on April 15, 1992, and the order entered in Case Nos. 91-5139, 91-5144, 91-5145, 91-5146, 91-5148, 91-5149, 91-5150 and 91-5151 (hereinafter "the consolidated cases") on June 9, 1991.

OPINIONS BELOW

The underlying opinion of the Court of Appeals in Case No. 91-5147 is reported at 957 F.2d 886 (D.C. Cir. 1991) (*per curiam*) and is appended hereto. (App. A1). The Court of Appeals order denying rehearing in Case No. 91-5147 is also appended hereto. (App. A28). The opinion of the district court in Case No. 91-5147 is reported at 763 F. Supp. 1154 and is appended hereto. (App. A12).

The order of the Court of Appeals in the consolidated cases, which summarily affirmed dismissal of those cases, is appended. (App. A8).

JURISDICTIONAL STATEMENT

The judgment of the Court of Appeals in Case No. 91-5147 was entered on March 6, 1992. Rehearing was denied by the Court of Appeals in Case No. 91-5147 on April 15, 1992. The order of the Court Appeals in the consolidated cases was entered on June 9, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Constitution of the United States, article II, § 2, article III, § 2, and article VI, cl. 2; Hague Convention IV of 1907, article 3, and articles 42 and 43 of the Annexed Regulations, 36 Stat. 2277, 2290, 2306; 28 U.S.C. §§ 1346(b), 1350, 2671-2680. (*See* Apps. A29-A31).

STATEMENT OF THE CASE

Petitioners initiated Court of Appeals Case No. 91-5147 by filing a complaint in the district court for damages arising out of the invasion of Panama by United States military forces on December 20, 1989. (*See* Amended Complaint, dated September 6, 1990) (Apps. A42-A45). Jurisdiction in the district court was established under 28 U.S.C. § 1346(b). The government filed a motion to dismiss which was granted by the district court on April 30, 1991. (App. A10). Petitioners appealed to the Court of Appeals. The government filed a motion for summary affirmance on July 10, 1991. Subsequent to briefing on the motion, the Republic of Panama transmitted two Diplomatic Notes to the United States requesting that the United States courts assert jurisdiction over the claims. (Apps. A32-A41). Petitioners filed a motion on March 4, 1992 to

have the Court of Appeals include the Notes in the record.[1] The Court of Appeals never ruled on that motion, but granted the motion for summary affirmance on March 6, 1992 and denied rehearing on April 15, 1992. (Apps. A1, A28).

Complaints in the consolidated cases, establishing jurisdiction under 28 U.S.C. § 1346(b), were filed at various intervals. All complaints in the consolidated cases arose out of the same set of facts complained of in No. 91-5147, and presented virtually the same issues. The only difference between any of the cases pertains to proof of damages for the various parties. On April 30, 1991, the district court dismissed the consolidated cases per its opinion and order in *Industria Panificadora, S.A., et al. v. U.S.* (Ct. Apps. No. 91-5147). (*See, e.g.*, App. A11). Those petitioners appealed to the Court of Appeals, which held the cases in abeyance on August 16, 1991 pending disposition of the motion for summary affirmance in No. 91-5147, and consolidated them on March 6, 1992. (Apps. A24, A4). On March 6, 1992, petitioners in the consolidated cases filed a motion to include the same Diplomatic Notes in the record of those cases. On June 9, 1992, the Court of Appeals summarily affirmed the district court's dismissal of those actions, and dismissed the motions to submit the Diplomatic Notes as moot. (App. A8).

The pertinent facts, as set forth in the record in No. 91-5147, are as follows. The Armed Forces of the United States entered Panamanian territory on December 20, 1989. (Amended Complaint, para. 3). Those armed forces "occupied, pacified and controlled" at least until January 10, 1990, those areas of the Republic where petitioners maintained their commercial business premises. (Amended Complaint, para. 3). The military incursion had an immediate and dramatic impact on the Republic. The Panamanian Defense Force ("the PDF"), which also served as its police force, was effectively eliminated. (Amended Complaint, para. 4). The United States was aware that the PDF was the sole source of police power in the Republic and, more importantly, the PDF was eliminated as a combat force by the end of the first day of the incur-

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[1]The intervenors' motions to include the Diplomatic Notes in the record were dismissed as moot by the Court of Appeals on March 6, 1992. (Apps. A4, A26).

sion—at least in the areas of Panama City where petitioners' business premises are located.[2]

Within one day the Armed Forces of the United States secured all points of transportation access to Panama City, precluding PDF forces in the countryside from entering.[3] Similarly, on the first day, the United States secured the PDF headquarters and other facilities in Panama City, rendering the PDF no longer an effective fighting force. The fact is that by the close of December 22, 1989, the military combat in Panama City had ceased and the United States effectively controlled the City and certainly constituted the sole source of effective power in the area.[4] Although only hours before the incursion the United States recognized a new government of Pan-

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[2]The Washington Post reported that in a press briefing held on December 20, 1989, the morning of the invasion, General Colin L. Powell, Chairman of the Joint Chiefs of Staff, stated ". . . we don't have an effective police force in Panama City either—a Panamanian police force—one of the things we would hope to get re-established fairly quickly." On December 21, 1989, The Washington Post further reported that "the PDF had functioned as a national police force, and its law enforcement effectiveness was ended by the invasion." Press reports of the invasion confirmed that by the second day of the invasion, United States Armed Forces "took control of most of Panama and shattered Noriega's Panamanian Defense Forces. . . ." The Washington Post, pp. A1, A38, December 21, 1989. (Appendix to Plaintiffs' Opposition to Defendant's Motion to Dismiss ("App. to Pls.' Opp."), filed February 4, 1991 in the district court).

[3]The entire operation was summarized on December 21, 1989 in The New York Times. Army and Marine units isolated and then destroyed the PDF Headquarters in Panama City. Other American units secured the Bridge of the Americas and the Avenue of the Martyrs closing access to the west of Panama City and accross the Canal. Fort Amador to the south was isolated and then taken. American paratroopers and Rangers seized the International Airport to the north of the City and blocked the Pacora River Bridge to the east. The New York Times, p. A 20, December 21, 1989. (App. to Pls.' Opp.).

In point of fact, these operations were a military success of great magnitude. Moreover, and perhaps because of the speed and efficiency of the operation, no significant attempt was made by the PDF to come to the aid of its forces in Panama City, or other areas of the former Canal Zone. They were either eliminated, captured or simply surrendered as the United States forces moved out and gained effective control of the entire Republic within a few short days. On December 22, 1989, The New York Times reported President George Bush as declaring "the military phase of the Panama operation [is] 'pretty well wrapped up'." The New York Times, p. A1, December 22, 1989. (App. to Pls.' Opp.).

[4]Lt. Col. James L. Swank is quoted on that date as saying "the PDF has virtually ceased to exist as a combat organized force" and that the United States

ama, the newly constituted government had no visible means to enforce law and order except United States troops and military police.

The United States failed to exercise its police power obligations assumed under the Hague Convention Regulations. (Amended Complaint, para. 5). As a result of decisions made in the United States, (*see* Amended Complaint, para. 2), the government ". . . failed to provide adequate numbers of police personnel, equipment and orders to protect. . ." petitioners' property from extensive looting by Panamanian civilians. (Amended Complaint, para. 5).

Consequently, and for a considerable period of time, the veneer of civilization was stripped from Panama City. The chaos that ensued is not a pretty picture. Large and unarmed mobs began wholesale looting of petitioners' and other commercial premises. The worst damage occurred in the period immediately following seizure of the city, but in some cases extended into January, 1990. Two of those incidents are described in affidavits filed in the district court. The damage to the business premises of petitioner FX Video Club, S.A. occurred early in the days following American seizure of the city. The business was located near the Panamanian national television station, which was then occupied by United States forces. While those forces watched, looters ransacked FX Video's premises, taking or destroying all of the merchandise.[5]

The premises of petitioner Industria Panificadora, S.A. were located near the PDF Headquarters, but were not damaged by the seizure of the Headquarters. Indeed, because this target and the surrounding area was considered militarily sensitive, United States combat forces restricted entry by Panamanians until about January 7, 1990. Those restrictions were ended then, at which time extensive looting began, including destruction of this business, under the watchful eyes of American military forces. While the looting progressed, those forces refused requests for aid from this petition-

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was "actually taking over the law and order function in Panama City." The Washington Post, p. A31, December 22, 1989. (App. to Pls.' Opp.).

[5]*See* Affidavits of Ramon M. Moreno, General Manager of FX Video, and Edgar Sanchez, a witness to the looting. (App. to Pls.' Opp.).

er and directed the petitioner to the Headquarters of the United States Military Police, who likewise refused assistance.[6]

REASONS FOR GRANTING THE WRIT

The issues raised in this case are of first impression in this Court regarding the proper interpretation of the Hague Convention IV of 1907 and its Annexed Regulations, 36 Stat. 2277 *et seq.*[7] The United States was the motivating force for the conference and the treaty ultimately adopted by 64 nations. Resolution of the issues presented will have a profound effect on the treaty's interpretation throughout the world.

1. Petitioners, private Panamanian corporations, alleged in their complaints for a cause of action that the United States military forces violated article 43 of the Annexed Regulations to the Hague Convention IV of 1907 by failing to provide police protection of their property in the zone occupied by U.S. forces in the aftermath of the U.S. invasion of Panama in December, 1989. Article 43, which imposes a mandatory duty to provide such protection, states:

> **Article 43.** The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.

Hague Convention IV, 1907, Annexed Regulations, article 43, 36 Stat. 2277, 2306.

Under international law, "[o]ccupation . . . comes into being when the enemy government has been rendered incapable of exercising its authority in a given area." Von Glahn, *Law Among Nations* 665-666 (MacMillan Publishing, 3d ed. 1976). "Military occupation is a question of fact." U.S. Army Field Manual FM 27-

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[6]*See* Affidavit of Fernando D. Pinilla, President of Industria Panificadora. (App. to Pls.' Opp.).

[7]On June 16, 1992, the U.S. Court of Appeals for the Fourth Circuit issued its opinion in *Goldstar (Panama), S.A., et al. v. United States*, No. 91-2229 (4th Cir., June 16, 1992). That case arises out of the same set of facts as the instant case and involves substantially the same issues. Appellants in *Goldstar*, who are also represented by the undersigned counsel, will be filing in this Court a Petition for Writ of Certiorari to the Fourth Circuit on or before September 14, 1992.

10, *The Law of Land Warfare* §§ 355, 358 (1956); III Hyde, *International Law* 1876, 1877 (Little, Brown & Company, 2d ed. 1947).[8]

The United States has followed a policy of adherence to the Hague Convention since its inception. In a United States Diplomatic Note of November 10, 1950, the United States protested Soviet interference with and failure to control mob violence in the Soviet zone of occupied Austria. 1 Whiteman, *Digest of International Law* 970, 992-994 (1963). The importance of this policy cannot be ignored. The note to the Soviets is contrary to the policy adopted by the government in this case.

Secretary of State Acheson, in a Diplomatic Note to the Yugoslov Ambassador dated March 27, 1947, stated:

> The Government of Yugoslovia will be aware of the well established principle of international law prohibiting the confiscation of private property by the occupying power administering military government in occupied territory and the obligation to respect and protect the legitimate rights and interests of the population.

Id., at 960.

Mr. Hackworth, as Legal Adviser of the Department of State, wrote on May 7, 1936, "[a] military occupant, especially one who had conquered and subjugated a country, has supreme power over the territory occupied, and, to all intents and purposes, is the sovereign during the period of occupation." 1 Hackworth, *Digest of International Law* 156 (1940).

This Court in *In Matter of Yamashita*, 327 U.S. 1 (1946), upheld the criminal conviction of the Japanese commander of the Philippines during World War II for violating article 43 of the Annexed Regulations to the Hague Convention IV of 1907.

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[8]These police power obligations are referenced in the field manuals under which American Forces conduct belligerent operations. *See* U.S. Army Field Manual FM 27-10, *The Law of Land Warfare*, § 358 (1956), which states:

> . . . [M]ilitary occupation confers upon the invading force the means of exercising control of the period of occupation. . . . The exercise of these rights results from the established power of the occupant and *from the necessity of maintaining law and order, indispensable both to the inhabitants and the occupying force.* (Emphasis added).

The conduct of the contracting parties to a treaty must be given great weight. The United States has in the past met its duty under article 43 of the Hague Convention. This prior conduct, as previously noted, is important in the application of article 43 to the Panamanian invasion. In *Trans World Airlines v. Franklin Mint Corp.*, 466 U.S. 243, 104 S. Ct. 1776, 1786 (1984), Justice O'Connor, speaking for the Court, said in interpreting the Warsaw Convention:

> We may not ignore the actual, reasonably harmonious practice adopted by the United States and other signatories in the first 40 years of the Convention's existence. [Citations omitted] In determining whether the Executive Branch's domestic implementation of the Convention is consistent with the Convention's terms, our task is to construe a "contract" among nations. The conduct of the contracting parties in implementing that contract in the first 50 years of its operation cannot be ignored.

Id., 104 S. Ct. at 1786.

The Diplomatic Notes from the United States must be given great weight in interpreting the treaty. "[I]n resolving doubts the construction of a treaty by the political department of the government, while not conclusive upon courts called upon to construe it, is nevertheless of weight." *Factor v. Laubenheimer*, 290 U.S. 276, 295 (1933).

The rights and obligations of an occupying force were recognized by this Court long before the Hague Convention of 1907. In *United States v. Rice*, 4 Wheat 246 (1819), Justice Story held for the Court that British military forces were entitled to collect duties in occupied Maine during the War of 1812.

a. Since the United States violated its mandatory duty under article 43 of the Hague Convention annexations, petitioners are entitled to damages under article 3 of the Hague Convention, which provides:

> A belligerent party which violates the provisions of the said regulations shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces. 36 Stat. 2277, 2290.

The Hague Convention is self-executing. A self-executing treaty is one which, of its own force, confers rights on individuals without the need for any implementing legislation. A cause of action brought by private parties for violation of a treaty was recognized by this Court in *United States v. Schooner Peggy*, 1 Cranch 103 (1801), where the Court upheld the provisions of a treaty with France in reversing the condemnation of a French vessel. Chief Justice Marshall, speaking for the Court, stated:

> The constitution of the United States declares a treaty to be the supreme law of the land. Of consequence, its obligation on the courts of the United States must be admitted. It is certainly true that the execution of a contract between nations is to be demanded from, and in the general, superintended by, the executive of each nation; and, therefore, whatever the decision of this court may be relative to the rights of parties litigating before it, the claim upon the nation if unsatisfied, may still be asserted. But yet where a treaty is the law of the land, and as such affects the rights of parties litigating in court, that treaty as much binds those rights, and is as much to be regarded by the court, as an act of congress; and although restoration may be an executive, when viewed as a substantive act, independent of, and unconnected with, other circumstances, yet to condemn a vessel, the restoration of which is directed by a law of the land, would be a direct infraction of the law, and, of consequence, improper.

Id., at 107.

The obvious intent of the parties to this multi-lateral agreement was the protection of individuals.[9] This treaty deals with human rights. The Senate Committee Report on Foreign Relations,

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[9]The Final Act of the Second International Peace Conference, as referred to the Senate Committee on Foreign Relations on February 27, 1908, at p. 182, states:

> The Second International Peace Conference, proposed in the first instance by the President of the United States of America, having been convoked, on the invitation of His Majesty the Emperor of All the Russias, by Her Majesty the Queen of the Netherlands, assembled on the 15th June, 1907, at The Hague, in the Hall of the Knights, *for the purpose of giving a fresh development to the humanitarian principles* which

at p. 98, on the Laws and Customs of War on Land in the Hague Convention states:

> According to the views of the High Contracting Parties, these provisions, the wording of which has been inspired by the desire to diminish the evils of war, as far as military requirements permit, are intended to serve as a general rule of conduct for the belligerents in their mutual relations *and in their relations with the inhabitants*. (Emphasis added).

Treaties dealing with the protection of human rights by their nature accord rights to individuals. This is in direct contrast with treaties such as disarmament, which clearly accord no individual rights and govern only relations between nations.

Petitioners are in the nature of third party beneficiaries under the Hague Convention IV of 1907. Under American law it is well established that a third person may enforce a promise made for his benefit even though he is a stranger both to the contract and to the consideration. *Austin v. Seligman*, 18 F. 519 (2d Cir. 1893). The determining factor as to the rights of a third party beneficiary is the intention of the parties who actually made the contract. *Ohio Casualty Ins. Co. v. Beckwith*, 74 F.2d 75 (5th Cir. 1935). The real test is whether the contracting parties intended that a third person should receive a benefit which might be enforced in the courts. *Pennsylvania Cement Co. v. Bradley Const. Co.*, 7 F.2d 822 (2d Cir. 1925). *See also* Williston on Contracts § 359; Restatement of Contracts § 135-139.

A treaty is a contract between nation states. In the case at bar the obvious intent of the parties was to provide civil protection to civilians. Under American municipal corporation law, a citizen may sue under a contract entered into between the municipality and another party if the intent was to afford the citizens that benefit: *People v. Suburban R. Co.*, 178 Ill. 594, 53 N.E. 349 (1899).

b. The question of self-execution in this instance, however, may be mooted by the two Diplomatic Notes submitted by the Republic of Panama (apps. A32-A41) in which the issues of compensation are submitted to this Court for resolution. By submitting the

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served as a basis for the work of the First Conference of 1899. (Emphasis added).

matter to the United States courts, the Republic of Panama is acting in *parens patriae* to petitioners. The government tried to exclude the notes from judicial consideration. The Court of Appeals ignored the Notes. Because the Court of Appeals considered the cases by motion, petitioners were never given full opportunity to present their arguments in briefing or oral argument even though the Republic of Panama has requested that fair opportunity be afforded to the claimants in United States courts.[10] The effect of those Notes on this litigation should be addressed by this Court because it involves an important question regarding the impact of treaty interpretation under the Constitution.

The first Note was presented by the Government of Panama to the United States on August 19, 1991. The Note states that the Government of Panama is aware that private Panamanian citizens have brought lawsuits in the United States under the Hague Convention to obtain compensation for economic losses suffered following the 1989 invasion of Panama. The Note clearly supports the objective of the lawsuits and urges the United States to "carefully consider the reasons which motivated the filing of the lawsuits, such being to assure that those who suffered the destruction of their property may obtain just and equitable compensation." (App. A35).

On January 21, 1992, the Government of Panama presented its second Note to the United States concerning private party, Hague Convention damage claims. (App. A39). When the matter of the Diplomatic Notes was raised in the Petition for Rehearing before the Court of Appeals in No. 91-5147, as a basis for consideration of the Hague Convention as a separate cause of action, the Court of Appeals perfunctorily disposed of the issue, saying the matter had been disavowed in opposing the Motion for Summary Affirmance. The Court simply ignored the fact that the Notes had been received after the motion had been briefed. Had petitioners been accorded a full opportunity to brief and argue the matter as envisioned under Rules 28 and 34 of the Federal Rules of Appellate Procedure, the

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[10]Even before the Diplomatic Notes arose, appellants were prevented from fully presenting their case. Appellants' motion to exceed page limits in their response to the motion for summary affirmance in No. 91-5147 was denied by the Court of Appeals on August 16, 1991. (App. A24).

matter could have been fully developed. The Notes had a significant impact on the jurisdictional issue.

The fact that the Notes were not presented until after the district court granted the government's motion to dismiss certainly does not preclude this Court from considering the Notes on appeal. Normally, of course, an appellate court is limited to considering the record developed in the trial court. There is, however, a long established exception to that rule for suits such as this one which involve the interpretation of international agreements. The reason for the exception is that governmental proclamations are matters of which even an appellate court may take judicial notice at any time.

In *United States v. Reynes*, 50 U.S. (9 How.) 127, 147-48 (1850), this Court considered diplomatic records outside the developed record to determine whether a grant of land was protected by certain treaties. The Court ruled that "the public acts and proclamations of [foreign] governments, and those of their publicly recognized agents, in carrying into effect those treaties, though not made exhibits in this cause, are historical and notorious facts, of which the court can take regular judicial notice." *See also Jones v. United States*, 137 U.S. 202, 214-16 (1890); *Factor v. Laubenheimer*, 290 U.S. 276, 295 (1933) (in construing an extradition treaty the Court directed counsel's attention to matters outside the record and invited counsel to conduct a further search through "available diplomatic records and correspondence" in preparation for reargument).

Indeed, the government in other litigation has successfully submitted a Diplomatic Note from the pre-invasion Government of Panama on the very day of appellate oral argument. That Note contained, as is the case here, Panama's views on how to implement an international agreement to which both it and the United States were signatories. *Coplin v. U.S.*, 761 F.2d 688 (Fed. Cir. 1985). Not only was the Diplomatic Note considered by the appellate court in *Coplin*, but it was instrumental in the court's disposition on the merits. *See also Sumitomo Shoji America, Inc. v. Avagliano*, 457 U.S. 176, 184 n. 9 (1982) (Diplomatic Note submitted to the Supreme Court within a few days of argument was considered on the merits).

The Government of Panama has expressed its views on the application of the Hague Convention. While those views are not necessarily dispositive, they are entitled to substantive consideration on the merits by this Court, along with the other matters of

record. *See Sumitomo Shoji American, Inc. v. Avagliano, supra.* Petitioners urge the Court grant review to give consideration to the request.

c. Petitioners contend further that the clear, plain language of article 3 is a waiver of sovereign immunity for violations of the provisions of the Hague Convention, especially when viewed alongside the Alien Tort Claim Act (''ATCA''). The ATCA enhances article 3's self-execution. The ATCA provides that ''[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.'' 28 U.S.C. § 1350 (1976). The law was first passed by Congress in the first Judiciary Act of 1789. It was readopted by Congress on March 3, 1911. *See* c. 231, § 24, para. 17, 36 Stat. 1091, 1093. This was only two years after the Hague Convention was ratified by President Taft on February 23, 1909. 1 Bevans 631. Readoption of section 1350 followed on the heels of the United States' voluntary decision to be bound by the international precepts afforded by the treaty. The inference can be clearly drawn that section 1350 reflects the enhancement of the important provisions appearing in the treaty. If sovereign immunity was not intended to be waived by article 3, that provision would be unnecessary.

A significant characteristic of article 3 is that it expressly incorporates liability encountered through traditional agency principles, specifically for those acts committed by a belligerent party's armed forces personnel. This is consistent with the treatment of General Yamashita in *In Matter of Yamashita, supra*, where the general himself did not personally engage in the atrocities committed by his troops, yet was sentenced to death and hanged.

The Court of Appeals relied upon *Dreyfus v. Von Finch*, 534 F.2d 24 (2d Cir. 1976), *cert. denied*, 429 U.S. 835 (1976). That case is fully distinguishable from the case at bar. *Dreyfus* involved a Swiss citizen who sued a West German citizen for allegedly wrongfully confiscating property in Nazi Germany. It was not a case against the German government for violation of the treaty. That case is of no precedential or persuasive value here given the totally different factual scenario.

2. Petitioners do not rely solely upon the Hague Convention for providing a cause of action. Petitioners' action is also grounded

in tort under the Federal Tort Claims Act ("FTCA"), 28 U.S.C. §§ 1346(b), 2671-2680.

The Court of Appeals applied the FTCA in a manner inconsistent with prior decisions of this Court and expanded its exceptions far beyond those enunciated by Congress. Grant of this petition will enable the Court to correct an injustice and clarify the law.

This Court recognized in *Indian Towing Company v. United States*, 350 U.S. 61, 68 (1955), that the purpose of the FTCA is "to compensate the victims of negligence in the conduct of governmental activities in circumstances like unto those in which a private person would be liable. . . ." In *Indian Towing*, liability under the FTCA was upheld for negligence in the performance of a governmental public safety function, specifically the maintenance of a lighthouse. Likewise, in *Rayonier, Inc. v. United States*, 352 U.S. 315 (1957), liability under the FTCA was upheld for negligence in performing another governmental public safety function, in that case firefighting. The premise of both decisions is that once the United States assumes a duty of care, its liability under the FTCA is determined as if the public safety or other function is being performed by a private or non-governmental party.[11]

As stated in *Indian Towing:*

> The Coast Guard need not undertake the lighthouse service. But once it exercised its discretion to operate a light . . . and engendered reliance on the guidance afforded by the light, it was obligated to use due care to make certain that the light was kept in good working order; and, if the light did become extinguished, then the Coast Guard was further obligated to use due care to discover this fact and to repair the light or give warning that it was not functioning. If the Coast Guard failed in its duty and damage was thereby caused . . ., the United States is liable under the Tort Claims Act.

350 U.S. at 69.

The Hague Convention regulations create a duty of care that the United States has voluntarily assumed. This duty of care is not

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[11]For another instance where federal duties have been adjudged appropriate in an FTCA action, be it a question of preemption or choice of law rules, *see United States v. Muniz*, 374 U.S. 150, 164-5 (1963) (duty of care owed to federal detainees by Bureau of Prisons established by 18 U.S.C. § 4042).

at all unlike the situation when a private party assumes a duty to protect against criminal or other unlawful action, either by contract or otherwise. In such a situation, there is an exception to the ordinary rule that there is no legal duty to protect another person against criminal or unlawful conduct by third parties.[12]

The long history of compliance by the United States with article 43 cannot be ignored. In the past it has assumed that duty and attempted to do so here. Somehow the United States blundered in this case. It attempted to fulfill its duty but negligently failed to do so. The United States did send military police to Panama, but for reasons known only to the Pentagon, they failed to perform that duty.

Underlying *Indian Towing* and *Rayonier* is the accepted tort principle that a duty of care can be voluntarily assumed as well as imposed by law. Where the performance of a function involving a duty of care is voluntarily assumed by the government, a breach of the assumed duty is actionable in tort as it is for the breach of the ordinary duty of reasonable care imposed by common law.

The Hague Convention imposes special duties and obligations voluntarily assumed by the United States in this case. Tort law principles brought under the mechanisms provided by the FTCA render petitioners' suit actionable.

Under the FTCA the United States has waived sovereign immunity. The exceptions to the FTCA's waiver of sovereign immunity do not, based upon the facts in this case, bar the action. Thus, the Court of Appeals erred in holding that the discretionary function exception applies.

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[12]The Courts of the District of Columbia have adopted the common law principle that a voluntary undertaking of a protective action carries with it a duty of reasonable care. In *Remeikis v. Boss & Phelps, Inc.*, 419 A.2d 986, 991 (App. D.C. 1980), the Court citing *Glanzer v. Shepard*, 233 N.Y. 236, 135 N.E. 275, 276 (1922) and *Security National Bank v. Lish*, 311 A.2d 833, 834 (App. D.C. 1973), said: " '. . . [O]ne who assumes to act, even though gratuitously, may thereby become subject to the duty of acting carefully.' " *See also Gerace v. Liberty Mutual Insurance Co.*, 264 F. Supp. 95, 97 (D.D.C. 1966). The law in Virginia, where the Pentagon is located, is the same. *See Vandergrift v. United States*, 500 F. Supp. 229, 233 (E.D. Va. 1978) (FTCA action; "When an agency of the United States undertakes a task, it must perform the task with due care. . . . The Virginia law is the same. . . . One is entitled to assume another party will perform his duty. . . ." (Citations omitted).

The applicable statutory language for the "discretionary function," "foreign country" and "combatant activities" exceptions is:

> The provisions of this chapter and section 1346(b) of this title shall not apply to—
>
> (a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.
>
> * * *
>
> (j) Any claim arising out of combatant activities of the military or naval forces, or the Coast Guard, during time of war.
>
> (k) Any claim arising in a foreign country.

28 U.S.C. § 2680.

a. The courts below in the case at bar misconstrued the exceptions in the FTCA and misapplied *Dalehite v. United States*, 346 U.S. 15 (1953), *United States v. Varig Airlines*, 467 U.S. 797 (1984) and *Boyle v. United Technologies*, 487 U.S. 500 (1988).

Dalehite involved a disastrous explosion of ammonium nitrate fertilizer. The alleged negligence there involved deficiencies in the specifications adopted by the United States for the manufacture of the product. In *Varig Airlines*, this Court construed the applicability of the "discretionary function" exception to alleged governmental negligence in the performance of *civil regulatory functions*. The petitioner in *Boyle* brought that action alleging design defects in the manufacture of military hardware. *Dalehite*, *Varig Airlines*, and *Boyle*, which are predicated upon negligence in adopting regulations, are fully distinguishable from those cases where a mandatory duty under treaty exists, as in the case at bar.

The Court of Appeals misconstrued *Berkovitz v. U.S.*, 486 U.S. 531 (1988) and *United States v. Gaubert*, ____ U.S. ____,

111 S. Ct. 1267 (1991). Because of that misconstruction, it has injected complete confusion into the applicability of the discretionary function exception. The discretion provision of the FTCA applies to the formulation of regulations for specifications. However, where a treaty, statute or regulation sets forth a specific duty, there is no discretion and Section 2680(a) does not apply.

As this Court in *Gaubert* said:

> Under the applicable precedents, therefore, if a regulation mandates particular conduct, and the employee obeys the direction, the Government will be protected because the action will be deemed in furtherance of the policies which led to the promulgation of the regulation. *See Dalehite, supra*, at 36. If the employee violates the mandatory regulation, there will be no shelter from liability because there is no room for choice and the action will be contrary to policy. On the other hand, if a regulation allows the employee discretion, the very existence of the regulation creates a strong presumption that a discretionary act authorized by the regulation involves consideration of the same policies which led to the promulgation of the regulations.

111 S. Ct. at 1274.

Earlier in *Berkovitz*, the Court held that the discretionary function exception is no bar where its exercise "would violate a specific statutory and regulatory directive." 486 U.S. at 542. The dictates of *Berkovitz* and *Gaubert* clash head on with the holding of the district court and the Court of Appeals in this case.

In the case at bar, the mandatory requirements of the Hague Convention preclude the government from relying upon the discretionary defense because the Hague Convention *required* the United States to "take all measures in [its] power to restore, and ensure, . . . public order and safety." *See* Hague Convention IV, 1907, art. 43, Annexed Regulations, 36 Stat. 2277, 2306. (App. A30). It is clear that the negligence alleged in this case does not involve the formulation of policy or the performance of any quasi-legislative or quasi-judicial functions. It involves the operational aspects of applying an already established law.

Moreover, the FTCA exceptions to sovereign immunity at issue in this case involve mixed questions of law and fact that cannot

be summarily resolved under Rules 12 or 56 of Federal Rules of Civil Procedure. *See Sami v. United States*, 617 F.2d 755, 767 (D.C. Cir. 1979). As was observed in *Sami*, with respect to the FTCA's "discretionary" function exception, the scope of governmental discretion in performing a police power function and whether the function is " 'political,' 'social,' or 'economic' or necessarily involve[s] any policy making function at all . . . is of course partly a question of fact. . . ." *Id.* The *Sami* Court then went on to find that the record before it, which unlike the instant action was based on extensive discovery, did not demonstrate the undisputed factual basis needed for summary disposition. *Id.*

No question is raised in this case as to negligence in the initial policy decision to assume police power functions in Panama. The negligence alleged relates to the operational implementation of the treaty duty. The provisions of the Hague Convention provide a special obligation.

The Court of Appeals opinion focuses only on the FTCA in a two-fold analysis. First, it held that the FTCA's discretionary function exception sheltered the United States from liability for its exercise of police power duties in Panama, and second, that the discretionary function exception is not overcome by the Hague Convention (slip op. at 3) (App. A2). Petitioners respectfully suggest that both prongs of this analysis add to the language in the act and go beyond what Congress intended and enacted.

The Court of Appeals relied upon *Red Lake Band of Chippewa Indians v. U.S.*, 800 F.2d 1187, 1198 (D.C. Cir. 1986), for the proposition that federal officials deploying personnel in response to a hostage situation have discretion in assessing the degree of confidence to be placed in the deployed forces. However, that portion of the *Red Lake* opinion is mutually-exclusive with the first half of the decision, in which the district court was affirmed, and which held that "[a] government official has no discretion to violate binding laws, regulations, or policies that define the extent of his official powers." *Id.*, at 1196.[13] This is *precisely* the situation here, since

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[13]*See also id.*, at 1197 (". . . an individual agent's freedom to act as he believes will best protect human life is circumscribed by the rules that limit the bounds of his authority." (Footnote omitted). By way of contrast, there was no mandatory duty at hand in *Monarch Ins. Co., v. District of Columbia*, 353 F. Supp. 1249 (D.D.C. 1973), *aff'd*, 497 F.2d 684 (D.C. Cir.), *cert. den.*, 419 U.S. 1021 (1974).

article 43 is mandatory and the treaty is part of the law of the land. No room for discretion is provided.

The second prong of the Court's opinion holds that article 43 does not overcome the discretion exception because article 43 prescribes no course of conduct that the government must follow to avoid liability. First, this is proof by a negative, which flatly renders the FTCA meaningless if it is to be accepted that in every instance where discretion is not expressly circumscribed, liability will be foreclosed. This analysis runs contrary to the very purpose of the FTCA.

Second, with citation to *Berkovitz v. U.S.*, 486 U.S. 531, 536 (1988) and *Allen v. U.S.*, 816 F.2d 1417, 1421 (10th Cir. 1987), *cert. den.*, 484 U.S. 1004 (1988), the Court of Appeals held that whenever the statute, regulation or policy prescribes a course of action, there is no room for discretion, and that when discretion in fulfilling a duty is not expressly circumscribed, the exception applies. If this analysis stands, it becomes readily apparent that article 43, when read in conjunction with article 3, falls squarely within those parameters. Together, these articles proclaim that an occupying power "*shall* take *all measures in [its] power* to . . . ensure . . . public order and safety," and that for any violation of the duty, a party "*shall*, if the case demands, be liable to pay compensation." The Hague Convention and its regulations prescribe a specific course of action and expressly circumscribe discretion. It uses the commanding word "shall" and not "may". The courts below have amended the Hague language to insert "may" for "shall." The opinion below constitutes judicial legislation rather than interpretation. Such a radical departure by the lower courts compels review by this Court.

b. The negligence alleged in this case is not a failure by Armed Forces personnel in the Republic of Panama to use due care in the performance of the police power functions assigned to them on foreign soil. The negligence on which this action is based is the failure by the United States personnel located in Washington and the Pentagon who were in command of the military incursion to provide sufficient police protection after occupation. This sort of claim, which is referred to in *Beattie v. United States*, 756 F.2d 91 (D.C. Cir. 1984), as a "headquarters claim," is precisely the type of negligence that falls outside of the "foreign country" exception in that the negligence occurs in the United States although its "op-

erative effect'' is felt on foreign soil. *See Beattie v. United States*, 756 F.2d at 96.

As supported by the legislative history of the FTCA, the District of Columbia Circuit has held that negligent acts or omissions occurring in the United States are actionable even though the damage or injury occurs in a foreign country. Negligence is also actionable under the FTCA when it involves an operational police function. *Sami v. United States*, 617 F.2d 755, 768 (D.C. Cir. 1979); *Beattie v. United States*, 756 F.2d at 94-98.

The principles in *Sami* and *Beattie* were never mentioned by the Court of Appeals in its opinion. In *Sami*, the negligence alleged was improper instructions to a foreign government to arrest and detain the plaintiff. Those instructions were given in the United States. Their ''operative effect,'' *i.e.*, the damage or injury, occurred in Europe. The Court of Appeals in *Sami*, relying on the related legislative purpose for the exception and this Court's decision in *United States v. Spelar*, 338 U.S. 217 (1940), held that the ''foreign country'' exception ''does not apply if the wrongful acts or omissions complained of occur in the United States.'' *Sami v. United States*, 617 F.2d at 762. *See also Spelar*, 338 U.S. at 220-221.

The *Beattie* decision is also significant in that it addresses the underlying legislative history and purpose of the FTCA's ''foreign country'' exception. There the Court, citing *Spelar*, pointed out that the legislative intent underlying the exception is to prevent the FTCA liability of the United States from being determined under foreign law, which would be the case under *lex loci delicti* conflicts of law principles when the negligent acts or omissions occur on foreign soil. As the *Beattie* Court said,

> [T]he legislative will seems to be as the Supreme Court summarized in *Spelar*, that though Congress was ready to lay aside a great portion of the sovereign's ancient and unquestioned immunity from suit, it was unwilling to subject the United States to liabilities depending upon the law of a foreign power.

Beattie v. U.S., 756 F.2d at 95. The *Beattie* Court, after discussing the legislative intent, went on to cite *Sami* and refer to it and other cases as illustrating the principle that:

> [A]n FTCA claim may arise in the United States, because the negligent act or omission occurred here, even though the act or omission has its 'operative effect', *i.e.*, the injury occurred, in a foreign country.

Beattie v. U.S., 756 F.2d at 96.

Other authorities in accord with *Sami* and *Beattie* abound. Indeed, as the Court said in *Sami*, "no case to our knowledge has held the United States exempt from liability for acts or omissions occurring here which have their operative effect in another country." *Sami v. United States*, 617 F.2d at 762. The case analysis in the *Sami* opinion demonstrates that the "operative effects" cases are, if anything, settled law. *See Leaf v. United States*, 588 F.2d 733 (9th Cir. 1978) (holding that the "foreign country" exception does not apply to negligence alleged to have occurred in the United States with the resultant damage occurring in Mexico); *In Re Paris Air Crash of March 3, 1974*, 399 F. Supp. 732 (C.D. Cal. 1975) (holding that the exception does not apply in a similar situation involving alleged domestic negligence causing damage on foreign soil). *See also Roberts v. United States*, 498 F.2d 520, 522 n.2 (9th Cir.), *cert. den.*, 419 U.S. 1070 (1974); *Bronson v. United States*, 463 F. Supp. 908 (E.D. Pa. 1978). In the case at bar, there is no suggestion of the application of Panamanian law or the Civil Code. Here the application is clearly of American law.

c. Neither the alleged negligence in this case, *i.e.*, the failure to provide adequate police protection, nor the resultant injury, *i.e.*, damages caused by civilian looting, involve combatant activities. This FTCA exception to the waiver of sovereign immunity, section 2680(j), has infrequently been the subject of judicial construction, and Congress' deliberations on the FTCA provide no guidance as to the intent underlying the exception. Nonetheless, as was pointed out in *In Re "Agent Orange" Product Liability Litigation*, 580 F. Supp. 1242, 1255 (E.D.N.Y. 1984), the case law and commentators agree that the exception is to be "interpreted very narrowly."

Analysis of the exception by one commentator concludes that the statutory language "combat activities" means only "operations . . . directly connected with engaging the enemy." Note, *The Federal Tort Claims Act*, 56 Yale L.J. 534, 549 (1947). In 2 Jayson *Handling Federal Tort Claims* § 262 (1989), it was opined that the statutory language requires that the injury complained of arise from

"actual hostilities and physical violence." Likewise, " 'combat activities' . . . means the actual engaging in the exercise of physical force." *Skeels v. United States*, 72 F. Supp. 372, 374 (W.D. La. 1947), *quoted in, In re "Agent Orange" Product Liability Litigation*, 580 F. Supp. at 1255. It also bears mention that these interpretations of the exceptions are in full accord with the statute, which provides for the exception only when the damage arises from "combatant activities . . . during time of war." 28 U.S.C. § 2680(j).

The subject matter of the Panama civilian looting claims is far removed from the narrow confines of the "combatant activities" exception. The district court in *In Re "Agent Orange" Product Liability Litigation* observed that the mere fact that an injury is somehow related to combat is not the test to determine the applicability of the exception. The exception applies only if the injury is alleged to be caused by negligence in performing a *combat function:*

> Consistent with the well-settled interpretation of the foreign claims exemption, what must arise from the combat activities is not a "claim" but "an act or omission of an employee of the government." Thus, for example, if a civilian was injured on a battlefield by a grenade that exploded prematurely because the government's specifications for the grenade were improper, that civilian should not be barred by the combat activities exemption from suing. On the other hand, if a soldier was aiming the grenade at the enemy and, as a result of his negligence, a civilian was injured, the combat activities exception would apply.

Id., at 1255.

Neither the foreign country exception nor the combat activities exception in the FTCA have been previously addressed by this Court.

3. The district court in dismissing petitioners' complaints held that this action presents a nonjusticiable political question.[14] (App. A19). This is simply another way of saying that the separation of powers doctrine bars judicial inquiry. The countervailing doc-

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[14]The Court of Appeals did not address this question.

trine to separation of powers is that of checks and balances. Each of the three branches of government has a role regarding treaties.

The role of the judiciary regarding treaties is set forth in article III, section 2 cl. 1 of the United States Constitution, which provides:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority.[15]

As stated in *The Federalist* No. 80 (A. Hamilton) (McLean ed. 1788):

> A distinction may perhaps be imagined between cases arising upon treaties and the laws of nations and those which may stand merely on the footing of the municipal law. The former kind may be supposed proper for the federal jurisdiction, the latter for that of the States. But it is at least problematical, whether an unjust sentence against a foreigner, where the subject of controversy was wholly relative to the *lex loci*, would not, if unredressed, be an aggression upon his sovereign, as well as one which violated the stipulations of a treaty or the general law of nations. And a still greater objection to the distinction would result from the immense difficulty, if not impossibility, of a practical discrimination between the cases of one complexion and those of the other. So great a proportion of the cases in which foreigners are parties, involve national questions, that is by far most safe and most expedient to refer all those in which they are concerned to the national tribunals.
>
> * * *
>
> The judiciary authority of the Union is to extend:
>
> *Second.* To treaties made, or which shall be made, under the authority of the United States, and to all cases affecting ambassadors, other public ministers, and consuls. These be-

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[15]Principles of international law have long been regarded as part of the common law. *Ware v. Jones*, 3 Dall. 199 (1796); *MacLeod v. U.S.*, 229 U.S. 416 (1913).

> long to the fourth class of the enumerated cases, as they have an evident connection with the preservation of the national peace.

The role of the judiciary was recognized by Chief Justice Marshall in *United States v. Schooner Peggy*, 1 Cranch 103 (1801). In *Schooner Peggy*, the ship Trumbull had been commissioned by the President to take and seize any armed French vessel. After an exchange of fire it seized the *Schooner Peggy* in the West Indies. The owners, private citizens, sued for recovery of the vessel. The Court reversed and found in favor of the owner, holding that the treaty with France compelled return of the vessel.

Article III, section 2, clause 1 of the Constitution must be read in conjunction with article II, section 2, which provides for the President's powers as commander-in-chief of the military. Article II, section 2, clause 2 vests the President with treaty making power with concurrence of the Senate. The question raised in this case is whether the separation of powers doctrine excludes this Court from assuming jurisdiction.

Hamilton, in *The Federalist* No. 69 (A. Hamilton) (*New York Packet*, March 18, 1788), wrote:

> The President is to be commander-in-chief of the army and navy of the United States. In this respect his authority would be nominally the same with that of the king of Great Britain, but in substance much inferior to it. It would amount to nothing more than the supreme command and direction of the military and naval forces, as first General and admiral of the Confederacy; while that of the British king extends to the *declaring* of war and to the *raising* and *regulating* of fleets and armies,—all which, by the Constitution under consideration, would appertain to the legislature. The governor of New York, on the other hand, is by the constitution of the State vested only with the command of its militia and navy. But the constitutions of several of the States expressly declare their governors to be commanders-in-chief, as well of the army as navy; and it may well be a question, whether those of New Hampshire and Massachusetts, in particular, do not, in this instance, confer larger powers upon their respective governors, than

could be claimed by a President of the United States. (Emphasis in original).

The district court relied upon *Baker v. Carr*, 369 U.S. 186 (1962), which did not even involve the separation of powers doctrine. The *Baker* case involved application of the equal protection clause of the Fourteenth Amendment to compel reapportionment of the Tennessee legislature. A department of a state government is not within the realm of the separation of powers doctrine of the Constitution. The Tennessee legislature is not a co-equal branch with the federal judiciary. Nonetheless, the *Baker* Court rejected the argument that an issue deemed "political" barred juducial intervention.

The "political question" basis for nonjusticiability draws its origins from *Marbury v. Madison*, 1 Cranch 137, 165-166 (1803), where this Court said:

> Where the heads of departments are the political or confidential agents of the executive, merely to execute the will of the President, or rather to act in cases in which the executive possesses a constitutional or legal discretion, nothing can be more perfectly clear than that their acts are only politically examinable. But where a specific duty is assigned by law, and individual rights depend upon the performance of that duty, it seems equally clear that the individual who considers himself injured, has a right to resort to the laws of his country for a remedy.

As the Court observed in *Baker*, 369 U.S. at 210, "[t]he nonjusticiability of a political question is primarily a function of the separation of powers." When this action is viewed for what it in fact is, it is clearly not an attempt to place the Court in a supervisory role over the Executive Branch's engagement in foreign affairs and exercise of military power. This is a suit for property damages caused by negligence in the exercise of police power and for violation of a treaty. It challenges neither the invasion of Panama, the combat actions taken or the President's decisions concerning the relationship between our government and the Republic of Panama, the latter of which is neither a party to this suit nor involved in the subject negligent conduct. No challenge is directed at the decision

to assume police power. It is difficult to see any decision in this case imposing any future restrictions on the Executive Branch in foreign affairs or military action. Similarly, the resolution of this case does not involve any fundamental policy judgments. The essential difference here is that this case involves only the adjudication of private, not political, rights between the parties. It does not call into question any foreign policy or military decision by the President or any other policy-maker in the Executive Branch.

Furthermore, this case is not confronted with an absence of any manageable legal standards, nor does it require the creation of any new judicial standards. The common law standards of the FTCA, which have existed for fifty years, are more than adequate. This action calls for interpretation of a treaty. That is a matter fully justiciable under article III, section 2 of the Constitution. Moreover, it is fully within the power and duty of this Court under article III, section 2 of the Constitution to decide whether the military had a duty under the treaty and whether its breach of that duty gives rise to a good cause of action under the FTCA.

This Court in *Powell v. McCormick*, 395 U.S. 486, 517 (1969), said:

> In deciding generally whether a claim is justiciable, a court must determine whether 'the duty asserted can be judicially identified and its breach judicially determined, and whether protection for the right asserted can be judicially molded.' *Baker v. Carr, supra,* at 198.

In this case, the duty can be readily identified and the breach judicially ascertained. No doubt the protection of the right can be judicially molded. It is simply a claim for money damages.

The implication that the breach of a treaty obligation by the military is not subject to review by an article III court is directly contrary to the very principle upon which this government was founded. One of the grievances set forth in the Declaration of Independence (U.S. 1776) was that the King "has affected to render the Military independent of and superior to the Civil Power." For the Executive Branch of the government to now suggest that the Judicial Branch may not act as a check and balance is unseemly and contrary to the Constitution. The military, and its commanders, are not above the law. If they violate treaties to which this nation is a

party, they are accountable in the courts the same as any citizen. In the steel mill seizure case, *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), for example, this Court rejected the unlimited commander-in-chief powers sought by the President.

In *In Matter of Yamashita*, 327 U.S. 1 (1946), this Court interpreted and applied the principles of article 43 of the Hague Convention. It is contradictory for the district court to hold that it does not have jurisdiction to interpret article 43 of the Hague Convention when this Court did so in *Yamashita*, wherein a Japanese general was hanged for a violation of article 43.

If the Executive Branch does not wish to follow the dictates of a treaty, its recourse is to withdraw from the treaty—not to ignore or breach its provisions. This is a nation of laws. Treaties, to which the United States is a party and which the courts are obligated to adjudge, are part of that law. This need for consistency in application was referenced by Justice Jackson, concurring in the judgment and opinion of the Court in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 634 (1952) (Jackson, J., concurring), wherein he wrote:

> The opinions of judges, no less than executives and publicists, often suffer the infirmity of confusing the issue of a power's validity with the cause it is invoked to promote, of confounding the permanent executive office with its temporary occupant. The tendency is strong to emphasize transient results upon policies—such as wages or stabilization—and lose sight of enduring consequences upon the balanced power structure of our Republic.

To follow the district court's opinion to its ultimate conclusion, the Executive Branch would know no restriction and article III, § 2 of the Constitution would be meaningless. As Justice Jackson wrote further:

> When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter. Courts can sustain exclusive presidential control in such a case only by disabling the Congress from acting upon

> the subject. [Footnote omitted] Presidential claim to a power at once so conclusive and preclusive must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system.

Id., 343 U.S. at 637-8 (Jackson, J., concurring).

In this instance the alleged measures taken are incompatible with the expressed will of the Senate and the Executive Branch in a treaty.

The importance of adherence to treaties was critical in the early days of the Republic. The British had continued to keep troops on U.S. soil after signing the Treaty of Peace and in direct violation of that treaty. It was a humiliation of the United States.

The experience of John Jay with treaties is reflected in *The Federalist* No. 64 (J. Jay) (*New York Packet*, March 7, 1788), wherein he wrote:

> Others, though content that treaties should be made in the mode proposed, are averse to their being the *supreme* laws of the land. They insist, and profess to believe, that treaties like acts of assembly, should be repealable at pleasure. This idea seems to be new and peculiar to this country, but new errors as well as new truths, often appear. These gentlemen would do well to reflect that a treaty is only another name for a bargain, and that it would be impossible to find a nation who would make any bargain with us, which should be binding on them *absolutely*, but on us only so long and so far as we may think proper to be bound by it. They who make laws may, without doubt, amend or repeal them; and it will not be disputed that they who make treaties may alter or cancel them; but still let us not forget that treaties are made, not by only one of the contracting parties, but by both; and consequently, that as the consent of both was essential to their formation at first, so must it ever afterwards be to alter or cancel them. The proposed Constitution, therefore, has not in the least extended the obligation of treaties. They are just as binding, and just as far beyond the lawful reach of legislative acts now, as they will be at any future period, or under any form of government. (Emphasis in original).

Chief Justice Marshall's opinion in *Schooner Peggy* is a clear enunciation of the role of the judiciary under article III of the Constitution and the enforcement of treaty provisions in that role. The rule is clear—treaty violations will not be ignored by the judiciary. The role of this Court is not ousted by the commander-in-chief provision of article II. The United States took a position in those early days of the republic that it would uphold adherence to treaties, unlike the European states. That principle has not suffered deviation. The separation of powers doctrine does not preclude this Court's jurisdiction over the subject matter of this case.

Given the importance of these questions, petitioners urge this Court to grant review of the decision and orders below resulting in dismissal of their actions.

CONCLUSION

WHEREFORE, for the foregoing reasons, petitioners pray that this Court issue a writ of *certiorari* to the Court of Appeals for the District of Columbia Circuit.

Respectfully submitted,

Douglas B. McFadden
(Counsel of Record)
James A. Kline, IV
McFadden, Evans & Sill
1627 Eye Street, N.W.
Suite 810
Washington, D.C. 20006
(202) 293-0700

Attorneys for Petitioners

Of Counsel:
J. Michael Sara
Grove Place, Third Floor
2964 Aviation Avenue
Miami, Florida 33133
(305) 441-1627

APPENDIX

INDUSTRIA PANIFICADORA, S.A., et al., Appellants

v.

UNITED STATES of America, Appellee,

Lindo Marduro, S.A., et al., Intervenors

No. 91–5147.

United States Court of Appeals,
District of Columbia Circuit.

March 6, 1992.

Appeal from the United States District Court for the District of Columbia (Civil Action No. 90-01694)

Douglas B. McFadden and James A. Kline, Washington, D.C., for appellants.

Jay B. Stephens, U.S. Atty., John D. Bates, R. Craig Lawrence, and Thomas S. Rees, Asst. U.S. Attys., Washington, D.C., for appellee.

Allan I. Mendelsohn and Marvin L. Szymkowicz, Washington, D.C., for intervenors.

Before MIKVA, Chief Judge, and RUTH BADER GINSBURG and D.H. GINSBURG, Circuit Judges.

Opinion for the Court filed PER CURIAM.

ON MOTION FOR SUMMARY AFFIRMANCE

PER CURIAM:

Appellants, Panamanian business enterprises, allege that they suffered property damage during looting that occurred in the wake of the invasion of Panama by United States armed forces in December 1989. In 1990, after exhausting their administrative remedies, appellants brought this action in the United States District Court for the District of Columbia under the Federal Tort Claims Act ("FTCA"), 28 U.S.C. §§ 2671 *et seq.*, and the Alien Tort Claims Act ("ATCA"), 28 U.S.C. § 1350. The complaint charges that appellants' losses were caused by the negligence of U.S. officials who failed to provide adequate police protection during and after the

invasion. The district court dismissed the action, holding that the challenged decisions and conduct fell within the "discretionary function" exception to the FTCA, and that the ATCA did not provide an independent waiver of sovereign immunity. Alternatively, the district court ruled that the action presented a nonjusticiable political question. *See Industria Panificadora, S.A. v. United States*, 763 F. Supp. 1154 (D.D.C. 1991). The district court, we hold, correctly applied the FTCA's discretionary function exception. We affirm the district court's order on that ground, and express no opinion on that court's alternative, "political question" rationale.

The discretionary function exception, 28 U.S.C. § 2680(a), shields from tort liability discretionary governmental decisions and actions grounded on considerations of social, economic or political policy, whether at the "planning" or "operational" level. *See United States v. Gaubert*, 111 S. Ct. 1267, 1273-75 (1991); *United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797, 813-14 (1984). The district court correctly concluded, *see* 763 F. Supp. at 1156-59, that the decisions appellants question concern allocation of military and law enforcement resources, and are therefore sheltered by the exception. *Cf. Red Lake Band of Chippewa Indians v. United States*, 800 F.2d 1187, 1198 (D.C. Cir. 1986) (decisions by federal officials deploying personnel in response to a hostage situation); *Monarch Ins. Co. v. District of Columbia*, 353 F. Supp. 1249, 1256-59 (D.D.C. 1973) (planning and execution of riot control activities by the National Guard), *aff'd*, 497 F.2d 684 (D.C. Cir.) (table), *cert. denied*, 419 U.S. 1021 (1974).

Appellants assert that the United States was under a mandatory duty to provide police protection, imposed by Article 43 of the Convention Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, T.S. No. 539.* Even if Article 43 applied to U.S. forces in Panama, however, the discretionary function exception would bar recovery, for Article 43 prescribes no specific course of conduct that the government must follow to avert tort liability. *Cf. Berkovitz v. United States*, 486 U.S. 531, 536 (1988) (exception does not apply where statute, regulation or policy prescribes a specific course of action); *Allen v. United States*, 816

*Article 43 provides that an occupying authority must "take all the measures in [its] power to restore, and ensure, as far as possible, public order and safety" in the occupied area. 36 Stat. at 2306.

F.2d 1417, 1421 (10th Cir. 1987) (exception applies where statute imposes broad duty, but does not circumscribe discretion in determining how to fulfill that duty), *cert. denied*, 484 U.S. 1004 (1988).

The district court, furthermore, correctly noted that the ATCA itself does not provide a waiver of sovereign immunity. *See* 763 F. Supp. at 1159 n.6. Finally, because the district court properly ruled that the FTCA's discretionary function exception bar[s] appellants' action, we need not and do not decide whether the "political question" doctrine supplies an alternative ground for dismissal of the case. *See* 763 F. Supp. at 1159-61.

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 91-5139

September Term, 1991
FILED March 6, 1992
91cv00118

Distribuidora Comercial Vicky, S.A., *et al.*,
Appellants

v.

United States of America, *et al.*

91-5144

90cv03061

Victoria Enterprise S.A., *et al.*,
Appellants

v.

United States of America

91-5145

90cv02952

S.A. Rafbar, *et al.*,
Appellants

v.

United States of America

91-5146

91cv00887

Centro Marino, S.A., *et al.*,
Appellants

v.

United States of America

91-5147

90cv01694

Industria Panificadora, S.A., *et al.*,
Appellants

v.

United States of America

91-5148 91cv00945

Bonmark, S.A., *et al.*,

Appellant

v.

United States of America

91-5149 90cv02756

Vida Panama, S.A., *et al.*,

Appellants

v.

United States of America

91-5150 90cv02266

Panameubles, S.A., *et al.*,

Appellants

v.

United States of America

91-5151 91cv00596

Palacio Musical, S.A., *et al.*,

Appellants

v.

United States of America

91-5156 90cv02589

Lindo Marduro, S.A.,

Appellant

v.

United States of America

91-5161 91cv00495

Cia Panamena de Aceites, S.A., *et al.*,

Appellants

v.

United States of America

91-5162 91cv00925

Terminales Panama, S.A.,

Appellant

v.

United States of America

91-5163 90cv02264

Ricardo Perez, S.A., *et al.*,

Appellants

v.

United States of America

91-5164 90cv02823

Diacor, S.A., *et al.*,

Appellants

v.

United States of America

91-5165 90cv01966

Cencal, S.A., *et al.*,

Appellants

v.

United States of America

91-5169 90cv02281

Rodelag, S.A., *et al.*,

Appellants

v.

United States of America

BEFORE: Mikva, Chief Judge; Ruth B. Ginsburg and D.H. Ginsburg, Circuit Judges

ORDER

Upon consideration of the motion for summary affirmance in No. 91-5147, the responses thereto and the reply; the motion to supplement the record and the opposition thereto; the motion for

leave to submit a diplomatic note, the opposition thereto and the reply; and this court's order filed August 16, 1991, it is

ORDERED that the motion for summary affirmance be granted for the reasons stated in the *per curiam* opinion issued this date in No. 91-5147. It is

FURTHER ORDERED that the motion to supplement the record and the motion for leave to file a diplomatic note in No. 91-5147 be dismissed as moot. It is

FURTHER ORDERED, on the court's own motion, that Nos. 91-5139, 91-5144, 91-5145, 91-5146, 91-5148, 91-5149, 91-5150, 91-5151, 91-5156, 91-5161, 91-5162, 91-5163, 91-5164, 91-5165 and 91-5169 be consolidated. All future pleadings should bear the caption of the lead case, No. 91-5139, *Distribuidora Comercial Vicky, S.A., et al. v. United States*. It is

FURTHER ORDERED, on the court's own motion, that appellants in Nos. 91-5139 et al. show cause, within 14 days of the date of this order, why the district court's orders dismissing those cases should not also be summarily affirmed. Appellants are directed to file a joint response. Appellee may file a reply within 21 days of the date of this order.

The Clerk is directed to withhold issuance of the mandate in No. 91-5147 until seven days after disposition of any timely petition for rehearing. *See* D.C. Cir. Rule 15. The Clerk is further directed to file a copy of this order in No. 91-5147 and in Nos. 91-5139 et al. The Clerk is further directed to send a copy of this order to appellants in Nos. 91-5139 et al. both by certified mail, return receipt requested, and by first class mail.

Per Curiam

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 91-5139

September Term, 1991
FILED JUN 09 1992
91cv00118

Distribuidora Comercial Vicky, S.A., *et al.*,

Appellants

v.

United States of America

And Consolidated Cases

BEFORE: Wald, Edwards and Williams, Circuit Judges

ORDER

Upon consideration of the court's order to show cause, filed March 6, 1992, the response thereto and the reply, the motion to include diplomatic notes in the record, the opposition thereto, and the motions for leave to submit a second diplomatic note and the oppositions thereto, it is

ORDERED that the order to show cause be discharged. It is

FURTHER ORDERED that the district court's April 30, 1991 orders dismissing these actions be summarily affirmed for the reasons stated in this court's opinion in *Industria Panificadora, S.A. v. United States*, 957 F.2d 886 (D.C. Cir. 1992) (per curiam), *reh'g denied*, No. 91-5147 (D.C. Cir. Apr. 15, 1992). The merits of the parties' positions are so clear as to justify summary action. *See Taxpayers Watchdog, Inc. v. Stanley*, 819 F.2d 294, 297 (D.C. Cir. 1987) (per curiam); *Walker v. Washington*, 627 F.2d 541, 545 (D.C. Cir.) (per curiam), *cert. denied*, 449 U.S. 994 (1980). It is

FURTHER ORDERED that the motions to submit diplomatic notes be dismissed as moot.

The Clerk is directed to withhold issuance of the mandate herein until seven days after disposition of any timely petition for rehearing. *See* D.C. Cir. Rule 15.

Per Curiam

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

INDUSTRIA PANIFICADORA, S.A., INMOBILIARIA SANTA ANA, S.A., and F.X. VIDEO CLUB, S.A., *Plaintiffs*,	)	Civil Action
v.	)	
UNITED STATES OF AMERICA, *Defendant.*	)	No. 90-1694 SSH

ORDER

Upon consideration of defendant's motion to dismiss, plaintiffs' opposition thereto, and the entire record herein, for the reasons set forth in the accompanying Opinion, it hereby is

ORDERED, that defendant's motion is granted and the case is dismissed.

SO ORDERED.

/s/ Stanley S. Harris
Stanley S. Harris
United States District Judge

Date: APR 30 1991

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FILED APR 30 1991

DISTRIBUIDORA COMERCIAL VICKY, S.A., *et al.*,	)	
Plaintiffs,	)	
v.	)	Civil Action No. 91-118 SSH
UNITED STATES OF AMERICA,	)	
Defendant.	)	

ORDER

On March 14, 1991, the Court stayed this action pending the resolution of defendant's motion to dismiss in *Industria Panificadora, S.A., et al. v. United States,* Civil Action No. 90-1694, the first of seventeen cases before the Court that relate to losses incurred following the initiation of the United States' military operation in Panama in December 1989. Today, pursuant to an Opinion and Order, the Court has granted the United States' motion to dismiss in Civil Action No. 90-1694. Because the above-captioned case presents nearly identical legal issues, it is appropriate that it be dismissed as well. Accordingly, it hereby is

ORDERED, that the stay imposed by the Court on March 14, 1991, is lifted. It hereby further is

ORDERED, that the case is dismissed for the reasons set forth in the Court's Opinion issued today in Civil Action No. 90-1694.

SO ORDERED.

/s/ Stanley S. Harris
Stanley S. Harris
United States District Judge

Date: APR 30 1991

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

INDUSTRIA PANIFICADORA, S.A., INMOBILIARIA SANTA ANA, S.A., and F.X. VIDEO CLUB, S.A., *Plaintiffs*,	)	Civil Action
v.	)	
UNITED STATES OF AMERICA, *Defendant.*	)	No. 90-1694 SSH

OPINION

This matter is before the Court on the motion of defendant United States of America to dismiss the complaint in the above-entitled action. For the reasons set forth below, defendant's motion is granted, and the case is dismissed.

Background

In considering a motion to dismiss, the Court must accept as true the factual allegations of plaintiffs' complaint, and any ambiguities must be resolved in plaintiffs' favor. *See Doe v. United States Dept. of Justice*, 753 F.2d 1092, 1102 (D.C. Cir. 1985). The following facts are taken from the complaint.

Plaintiffs, Industria Panificadora, S.A., Inmobiliaria Santa Ana, S.A., and F.X. Video Club, S.A., have brought this action under the Federal Tort Claims Act (FTCA), 28 U.S.C.A. §§ 2671-2680, and under the Alien Tort Claims Act (ATCA), 28 U.S.C.A. § 1350, to recover damages for property losses.[1] Plaintiffs are corporations organized and existing under the laws of the Republic of

[1]In addition, sixteen related cases have been filed. Eleven cases were stayed by the Court's Order of March 14, 1991, pending the resolution of defendant's motion to dismiss in this case. Those cases include the following: Civil Action No. 90-1966; Civil Action No. 90-2264; Civil Action No. 90-2266; Civil Action No. 90-2281; Civil Action No. 90-2405; Civil Action No. 90-2589; Civil Action No. 90-2756; Civil Action No. 90-2823; Civil Action No. 90-2952; Civil Action No. 90-3061; and Civil Action No. 91-118. Subsequent to the issuance of that Order, five more related cases were filed: Civil Action No. 91-495; Civil Action No. 91-596; Civil Action No. 91-887; Civil Action No. 91-925; and Civil Action No. 91-945.

Panama, with their principal places of business in Panama City, Panama.

On or about December 20, 1989, United States Armed Forces engaged General Manuel Noriega's Panamanian Defense Force ("PDF") in Panama. The fighting was short-lived. In only a few days, the U.S. Armed Forces had defeated the PDF and caused the removal of General Noriega from power. The U.S. Armed Forces remained in Panama until approximately January 10, 1990. During part of this period, plaintiffs' properties were looted, burned, and destroyed by Panamanian civilians while the PDF, whose duties included the maintainance of public order, was engaged militarily with the U.S. Armed Forces. Attributing their property damages to defendant's alleged negligence, plaintiffs submitted claims to the United States Department of State for compensation. These claims were rejected. Through this action, plaintiffs now seek recovery for damages in the amount of $1,506,823.00.

Plaintiffs assert that the U.S. Armed Forces, by defeating the PDF, assumed the PDF's duty of maintaining public order in the alleged Occupied Zone.[2] Plaintiffs allege that unspecified U.S. personnel in Washington, D.C., breached such a duty by negligently failing to provide adequate numbers of police personnel to maintain public order. (Amended Complaint, paragraph 5.) Plaintiffs assert that they suffered damages as a direct and foreseeable consequence of such a decision.

Although the Court stayed those cases for administrative convenience, the Court did review the plaintiffs' arguments in those cases that were briefed, principally in light of the fact that plaintiffs' counsel in some of the cases are different from counsel in the above-captioned case. *See* Plaintiffs' Motion To Lift Stay, filed in Civil Action No. 90-1966.

[2]One disputed issue is whether the United States owed a duty to plaintiffs of maintaining public law and order under the Hague Convention, to which the United States is a signatory. The Hague Convention would apply where Panama was an "occupied territory." Plaintiffs assert that the U.S. Armed Forces displaced the PDF, thus transforming the area in question into an "occupied territory." Defendant maintains that the increase in U.S. military forces in Panama did not displace the authority of the legitimate government in Panama. (Declaration of Richard A. Clarke.) Defendant also denies plaintiffs' assertion that there was a United States policy decision to assume police power functions in Panama. (Declaration of Richard A. Clarke.) Because this action must be dismissed under the discretionary function exception to the FTCA, it is not necessary to address this issue definitively.

Defendant argues that plaintiffs' action must be dismissed because the Court lacks subject matter jurisdiction under the FTCA and the ATCA. Alternatively, defendant argues that this suit presents a nonjusticiable political question.

Discussion

A. *Federal Tort Claims Act*

The FTCA was designed to render the United States liable for its torts essentially in the same manner and to the same extent as an individual, in like circumstances, under the law of the place where the wrong occurred. *See United States v. Yellow Cab Co.*, 340 U.S. 543 (1951). However, liability under the Act does not give rise to a carte blanche. The United States is liable only in the manner and to the extent to which it has consented. Although the FTCA "waives the Government's immunity from suit in sweeping language," *id.* at 547, the waiver is limited by the terms of the Act's exceptions. If a claim falls within any exception to the FTCA, sovereign immunity has not been waived and the court is without jurisdiction to hear the case. *United States v. Orleans*, 425 U.S. 807, 814 (1976).

In its motion to dismiss, defendant argues that several such exceptions bar suit under the FTCA. They are: (1) the foreign country exception (28 U.S.C.A. § 2680(k)); (2) the combatant activities exception (28 U.S.C.A. § 2680(j)); (3) the exception that applies where where there is no actionable duty under applicable state law (28 U.S.C.A. §§ 1346(b), 2674); and (4) the discretionary function exception (28 U.S.C.A. § 2680(a)). Because the Court finds that the discretionary function exception applies to this case, the remaining three exceptions need not be addressed.

1. *Discretionary Function Exception*

The discretionary function exception includes:

> "[a]ny claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or

> duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused."

28 U.S.C.A. § 2680(a).

This exception "marks the boundary between Congress' willingness to impose tort liability upon the United States and its desire to protect certain governmental activities from exposure to suit by private individuals." *United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797, 808 (1984). Where that "boundary" lies, however, has been subject to much interpretation by courts, because Congress did not clearly define "discretionary function."[3]

The discretionary function exception articulates a policy of preventing tort actions from becoming a vehicle for judicial interference with decision-making that is properly exercised by other government branches. The exception embodies the separation of powers. *Blessing v. United States*, 447 F. Supp. 1160 (E.D. Pa. 1978). The seminal case of *Dalehite v. United States*, 346 U.S. 15 (1953), sets forth a broad interpretation of the exception. In that case, the Court held that the discretionary function exception barred recovery for claims arising from a massive fertilizer explosion. The fertilizer had been manufactured, packaged, and prepared for export pursuant to detailed regulations as part of a comprehensive federal program aimed at increasing the food supply in occupied areas after World War II. *Id.* at 19-21. Not only was the cabinet-level decision to institute the fertilizer program discretionary, but so too were the decisions concerning the specific requirements for manufacturing the fertilizer. *Id.* at 37-38. The Court stated:

> It is unnecessary to define, apart from this case, precisely where discretion ends. It is enough to hold, as we do, that the 'discretionary function or duty' that cannot form a basis for suit under the Tort Claims Act includes more than the initia-

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[3]Historically, the discretionary function derives from the considerable body of case law which gives to federal officials an immunity from suits arising out of certain kinds of official acts. The reason most frequently advanced for this immunity is the fear that the threat of damage suits would stultify decision-making. *See* Note, *Development in the Law—Remedies Against the United States and its Officials*, 70 HARV. L. REV. 827, 892 (1957).

> tion of programs and activities. It also includes determinations made by executives or administrators in establishing plans, specifications, or schedules of operations. Where there is room for policy judgment and decision there is discretion.

Id. at 35-36.

Unfortunately, the "lower court decisions since *Dalehite* do not comprise a particularly coherent body of case law." *Blessing*, 447 F. Supp. at 1172.[4] In determining whether the discretionary function exception applies, some courts have made a distinction between "planning" and "operational" decisions. Such a distinction is confusing because "planning" is seldom one defined stage of an overall operation.[5] "At what point, if any, are programmatic decisions and refinements made at the operational rather than at the planning level?" *Id.* at 1173 n.19. This question exemplifies the line-drawing problem that lower courts have faced in dealing with the discretionary function exception.

Recently, the Supreme Court clarified the planning/operational distinction. The Court criticised lower courts' interpretation of this matter, stating that they were "perpetuating a nonexistent dichotomy between the discretionary functions and operational activities." *United States v. Gaubert*, 59 U.S.L.W. 4244, 4247 (U.S. Mar. 26,

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[4]*Compare, e.g., Monarch Insurance Co. v. District of Columbia*, 353 F. Supp. 1249, 1258-1259 (D.D.C. 1973) (planning and implementation of a riot control program for use during civil orders is a discretionary function), *aff'd*, 497 F.2d 684, *cert. denied*, 419 U.S. 1021 (1974), *with Downs v. United States*, 522 F.2d 990 (6th Cir. 1975) (FBI agent's decision on how to handle an airplane hijacking not a protected act of discretion), *and Miller v. United States*, 410 F. Supp. 425 (E.D. Mich. 1976) (negligent operation of waterworks protected by discretionary function exception), *modified*, 583 F.2d 857 (6th Cir. 1978), *with Ingham v. Eastern Air Lines, Inc.*, 373 F.2d 227 (2d Cir.) (negligent operation of airport control tower not a protected act of discretion), *cert. denied*, 389 U.S. 931 (1967).

[5]The court in *Blessing* summed up this problem, stating "[t]he frontier where planning ends and operations begin . . . is seldom sharply marked. Because plans and programs are not often put into effect mechanically, judgments of varying sorts and degrees must be made in taking all but the most reflexive actions. Accordingly, most operations retain some 'planning' elements right up to the final execution." 447 F. Supp. at 1173 n. 19. In *Dalehite*, the Supreme Court similarly recognized that the "planning" function extends beyond the mere "initiation of programs" and "includes determinations made by executives or administrators in establishing plans, specifications or schedules of operations." 346 U.S. at 35-36.

1991) (No. 89-1793). In *Gaubert*, the United States Court of Appeals for the Fifth Circuit had held that the Federal Home Loan Bank Board and the Federal Home Loan Bank-Dallas had been negligent in carrying out their supervisory activities over certain aspects of a thrift institution's operation and that those actions were not within the discretionary function exception. 885 F.2d 1284 (5th Cir. 1989). The Supreme Court reversed, stating that "[d]iscretionary conduct is not confined to the policy or planning level." 59 U.S.L.W. at 4247. Rather, "[a] discretionary act is one that involves choice or judgment; there is nothing in that description that refers exclusively to policy-making or planning functions." *Id.* at 4247. Moreover, "it is the nature of the conduct, rather than the status of the actor, that governs whether the discretionary function exception applies in a given case." *Varig Airlines*, 467 U.S. at 813.

Other recent cases also have defined the nature of the conduct for which the exception is intended to apply. In *Varig Airlines*, the Court held that the Federal Aviation Administration's actions in formulating and implementing a "spot-check" plan for airplane inspection was protected by the discretionary function exception because of the agency's authority to establish safety standards for airplanes. *Id.* at 815. Actions taken in furtherance of the program were likewise protected, even if those particular actions were negligent. *Id.* at 820. In *Berkovitz v. United States*, 486 U.S. 531, 533 (1988), the Court examined a comprehensive regulatory scheme governing the licensing of laboratories to produce polio vaccines and the release of particular drugs to the public. The Court found that some of the claims fell outside the exception, but only because the agency employees had failed to follow the specific directions contained in the applicable regulations, and that in those instances, there was no room for choice or judgment. *Id.* at 542-543. The case was remanded for analysis of the remaining claims in light of the applicable regulations. *Id.* at 544. The Court stated: "[A]ssuming the challenged conduct involves an element of judgment, a court must determine whether that judgment is of the kind that the discretionary funciton was designed to shield." *Id.* at 536.

The nature of the conduct reviewed in *Monarch Insurance Co. v. District of Columbia*, 353 F. Supp. 1249 (D.D.C. 1973), *aff'd*, 497 F.2d 684 (D.C. Cir.), *cert. denied*, 419 U.S. 1021 (1974), is comparable to that of the instant case. In *Monarch*, this court held that the discretionary function exception barred claims challenging

the adequacy of troops and police forces assigned in connection with third-party looting following the assassination of Dr. Martin Luther King, Jr. Similarly, in *Smith v. United States*, 330 F. Supp. 867 (E.D. Mich. 1971), the court held that the discretionary function exception applied. The plaintiff Smith, who was shot by National Guardsmen during a city riot, alleged negligence on the part of the Secretary of Defense and high-ranking officers of the National Guard and the Army. *Id.* at 868. The court stated:

> The means and method of restoring order in a city faced with anarchy and breakdown of civilian authority are delegated to the Executive Branch of the Government, not the judiciary. That some may say with the wisdom of hindsight that the National Guard was not sufficiently prepared to cope with the delicate task of quelling a riot . . . does not create a cause of action. It is more appropriately a plea addressed to the legislative and executive branches of the Government.

Id. at 869.

In addition, it is clear that the discretionary function exception protects military policy judgments. In *Boyle v. United Technologies Corp.*, the Court stated:

> We think that the selection of the appropriate design for military equipment to be used by our Armed Forces is assuredly a discretionary function within the meaning of [28 U.S.C.A. § 2680(a)]. It often involves not merely engineering analysis but judgment as to the balancing of many technical, military, and even social considerations, including specifically the trade-off between greater safety and greater combat effectiveness.

487 U.S. 500, 511 (1988).

The discretionary function exception is clearly applicable to the instant case. This case involves Executive Branch judgments that are grounded in political, military, and foreign policy considerations. Plaintiffs' amended complaint unquestionably challenges Executive Branch decisions concerning the numbers of military personnel to be utilized, their deployment, and the kinds of orders that should be issued in furtherance thereof.

Plaintiffs assert that "[t]he record in this case is admittedly far too preliminary for any positive conclusions at this time, but it is clear that the negligence alleged does not involve the formulation of policy or the performance of any quasilegislative or judicial functions." (Plaintiffs' Opposition, at 27-28.) The facts show otherwise. In their amended complaint, plaintiffs assert that the "high officials" in Washington who "planned" the military action were negligent, not the U.S. personnel in Panama that handled the "operational" matters. Plaintiffs assert that this case does not question military strategy or foreign policy decisions by the Executive Branch. Yet they seek to distinguish the decision to undertake military action from the decision on how many military police to utilize in Panama. They do not question the U.S. decision to engage the PDF, but they do question the Executive Branch's decision on how to handle the aftermath of the initial attack. Because both decisions involved planning of the U.S. military operation in Panama, this distinction is unconvincing.

Although plaintiffs urge that the United States has consented to this lawsuit and is liable for negligent acts at the "operational level," the Court concludes that their factual allegations fall squarely within the area of the discretionary function exception.[6]

B. *Nonjusticiable Political Question*

Defendant also argues that plaintiffs' action should be dismissed because it involves a nonjusticiable political question. "The political question doctrine excludes from judicial review those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the halls of Congress or the confines of the Executive Branch." *Japan Whaling Ass'n v. American Cetacean Society*, 478 U.S. 221, 230 (1986). Both the separation of powers doctrine and the policy of judicial self-restraint require that federal courts refrain from intrusion into areas committed by the Constitution to the Legislative and Executive Branches of the Government. *Baker v. Carr*, 369 U.S. 186

[6]Plaintiffs also purport to bring this action under the Alien Tort Claims Act, 28 U.S.C.A. § 1350. However, defendant correctly argues that the ATCA is not itself a waiver of the sovereign immunity of the United States. *See Sanchez-Espinoza v. Reagan*, 770 F.2d 202, 207 (D.C. Cir. 1985). Plaintiffs argue that the waiver is provided by the FTCA. However, because this case falls within the discretionary function exception, sovereign immunity has not been waived.

(1962). The Supreme Court has defined "nonjusticiability" as "the inappropriateness of the subject matter for judicial consideration." *Id.* at 198. The Court also has defined those elements that serve to identify nonjusticiable political questions. It has stated:

> Prominent on the surface of any case held to involve a political question is found [1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Baker, 369 U.S. at 217.

If one of these conditions is inextricable from the case at bar, then adjudication of the case may be said to require resolution of a political question, which is nonjusticiable and hence not reviewable by a court. *Id. See also Greenham Women Against Cruise Missiles v. Reagan*, 591 F. Supp. 1332, 1335 (S.D.N.Y. 1984). However, while only one of these elements must be present, it must be significant for there to be a nonjusticiable political question. *Baker*, 369 U.S. at 217. The Court finds that several of the *Baker* elements present themselves in the instant case.

Plaintiffs' allegations fall within the first element discussed in *Baker*. It is well established that decisions pertaining to national security, such as whether and how to use military forces, are entrusted to the political branches. CONST. Art. II.[7]

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[7]There is considerable case law in this area. *See, e.g., Haig v. Agee*, 453 U.S. 280, 292 (1981) (matters closely related to foreign policy and national security rarely proper for judicial intervention); *DaCosta v. Laird*, 471 F.2d 1146, 1154 (2d Cir. 1973) (Article II, § 2 of the Constitution is a "specific textual commitment of decision-making responsibility in the area of military operations in a theatre of war to the President, in his capacity as Commander in Chief"); *United States ex rel. Keefe v. Dulles*, 222 F.2d 390 (D.C. Cir. 1954) (responsibility for

In addition, the instant case falls within the second element of *Baker*, because decisions which affect our national security involve policy decisions beyond the scope of judical expertise. "To attempt to decide such a matter without the necessary expertise and in the absence of judicially manageable standards would be to entangle the court in matters constitutionally given to the executive branch." *In re Korean Air Lines Disaster*, 597 F. Supp. 613, 616 (D.D.C. 1984), *aff'd*, 829 F.2d 1171 (D.C. Cir. 1987).

The issues of the instant case are comparable to those in *Nejad v. United States*, 724 F. Supp. 753, 754 (C.D. Cal. 1989). In that case, plaintiffs brought an FTCA action based upon the Navy's shooting down of an Iranian airliner over the Persian Gulf. Plaintiffs asserted that the political question doctrine should not apply because they did not challenge the President's decision to send warships to the Persian Gulf but only the manner in which the President's decision was carried out by the Navy. The court rejected such a distinction, stating:

> Here, it is indubitably clear that plaintiffs' claim calls into question the Navy's decisions and actions in execution of those decisions. The conduct of such affairs are constitutionally committed to the President as Commander in Chief and to his military and naval subordinates. Thus, the claim here implicates possibly all and at least formulations [1], [4], [5] and [6] of *Baker v. Carr*. Plaintiffs contend that they do not call into question the President's decision to send U.S. warships to the Persian Gulf, but only the negligent manner in which the President's decision was carried out. This contention too must fail.
>
> [T]he same considerations which preclude judicial examination of the decision to act must necessarily bar examination of the manner in which that decision was executed by the President's subordinates. The textual commitment to the President as commander in chief of authority for military decision entails that his decision may be implemented without judicial scrutiny. . . .

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dealing with foreign nations over the seizure of American property or persons is clearly committed to the President), *cert. denied*, 348 U.S. 952 (1955).

Id. (quoting *Rappenecker v. United States*, 509 F. Supp. 1024, 1030 (N.D. Cal. 1980)).

Similarly, this court in *Monarch* stated that "[p]olicy considerations directly related to objectives which are, in the strictest sense of the term, governmental or political pervade every phase of planning and executing a riot control program. Such considerations point not only to discretionary functions free from liability under the Tort Claims Act but to political questions which are beyond the jurisdiction of this Court." 353 F. Supp. at 1258.

In the instant case, plaintiffs assert that their suit "does not call into question any foreign policy or military decision by the President or any other policy maker in the Executive Branch." (Plaintiffs' Opposition, at 37.) Plaintiffs state that their suit is "for property damages caused by negligence in the exercise of police power." (Plaintiffs' Opposition, at 37.) At the same time, plaintiffs assert that "[t]he negligence on which this action is based is the failure by the United States personnel located in Washington, and in command of the military incursion, to assign sufficient military police after the civil disorders in Panama City occurred." (Plaintiffs' Opposition, at 21.)

Plaintiffs' assertions contradict themselves. The decision on how many military police to assign to Panama was a decision made by the military. Thus, while plaintiffs carefully worded their amended complaint to suggest a basis in traditional tort concepts of due care and negligence, their allegations implicate broader political questions that encompass U.S. foreign policy and military operations. Any judicial inquiry into the reasonableness of the decisions at issue would require that this Court second-guess Executive Branch decisions, some of which were made while military personnel were engaged in combat. Such an inquiry would be fraught with national security considerations and unmanageable political and military issues. Not only are there no judicially manageable standards for the Court to follow in resolving these issues, but an independent resolution would show a lack of respect due to a coordinate branch. Although plaintiffs contend that this case does not possess those elements set forth in *Baker*, the facts show that plaintiffs' action involves judicial review of executive branch decisions pertaining to the nature, conduct, and implementation of a presidentially-directed military operation in a foreign country. This goes to the heart of the political question doctrine. Therefore, the Court

concludes that plaintiffs' claim presents a clear nonjusticiable political question. Because plaintiffs' claims fall within the discretionary function exception to the FTCA and because they present a nonjusticiable political question, the case must be dismissed.[8]

An appropriate Order accompanies this Opinion.[9]

/s/ Stanley S. Harris
Stanley S. Harris
United States District Judge

Date: APR 30 1991

[8]In light of the Court's ruling, and in the interest of efficient administration in the event of an appeal, the Court will lift the stays in the eleven cases set forth *supra* in footnote 1, and simultaneously will dismiss all sixteen related cases for the reasons set forth above.

[9]The Court is sympathetic to the circumstances which led to the filing of these related lawsuits; the Court deplores the looting and pillaging by Panamanian civilians which led to the losses plaintiffs have suffered. However, there cannot be a judicially imposed remedy for all wrongs.

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 91-5147

September Term, 1990
FILED AUG 16 1991
CA. No. 90-01649

Industria Panificadora, S.A., *et al.*,
Appellants

v.

United States of America

BEFORE: Buckley and Sentelle, Circuit Judges

ORDER

Upon consideration of the motion to stay, or in the alternative, for an extension of time, and the responses thereto; the motions to consolidate, the responses thereto and the reply; the motion to file motion to intervene out of time; and appellant's motion to extend time and to exceed page limits, it is

ORDERED that No. 91-5139, *Distribuidora Comercial Vicky, S.A., et al. v. United States*; No. 91-5144, *Victoria Enterprise S.A., et al. v. United States*; No. 91-5145, *S.A. Rafbar, et al. v. United States*; No. 91-5146, *Centro Marino, S.A., et al. v. United States*; No. 91-5148, *Bonmark, S.A., et al. v. United States*; No. 91-5149, *Vida Panama, S.A., et al. v. United States*; No. 91-5150, *Panameubles, S.A., et al. v. United States*; No. 91-5151, *Palacio Musical, S.A., et al. v. United States*; No. 91-5156, *Lindo Marduro, S.A. v. United States*; No. 91-5161, *Cia Panamena de Aceites, S.A., et al. v. United States*; No. 91-5162, *Terminales Panama, S.A. v. United States*; No. 91-5163, *Recardo Perez, S.A., et al. v. United States*; No. 91-5164, *Diacor, S.A., et al. v. United States*; No. 91-5165, *Cencal, S.A., et al. v. United States*; No. 91-5169, *Rodelag, S.A., et al. v. United States*, be held in abeyance pending disposition of the summary affirmance motion pending in No. 91-5147. It is

FURTHER ORDERED that consideration of the motions for consolidation be deferred pending disposition of the summary affirmance motion pending in No. 91-5147. It is

FURTHER ORDERED that the motion for leave to file motion to intervene out of time be granted. The Clerk is directed to file the lodged motion. It is

FURTHER ORDERED that the motion to intervene be granted. Intervenors' response appellee's motion for summary affirmance shall not exceed ten pages and shall not repeat arguments made by appellants in their response to the summary affirmance motion. Intervenors' response to appellee's motion for summary affirmance is now due within seven days from the date of this order. It is

FURTHER ORDERED that the appellants' motion to exceed the page limits be denied. Appellants have failed to present "extraordinary and compelling reasons" to justify exceeding the twenty-page limit prescribed by D.C. Cir. Rule 7(a)(2). *See* D.C. Cir. Rule 7(k)(3). Appellants' conforming response to appellee's motion for summary affirmance is now due within three days from the date of this order.

Per Curiam

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 91-5139

September Term, 1991
FILED March 6, 1992
91cv00118

Distribuidora Comercial Vicky, S.A., *et al.*,
Appellants

v.

United States of America, *et al. and*

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consolidated cases

91-5147

90cv01694

Industria Panificadora, S.A., *et al.*,
Appellants

v.

United States of America

BEFORE: Mikva, Chief Judge; Ruth B. Ginsburg and D.H. Ginsburg, Circuit Judges

ORDER

Upon consideration of the motion for leave to submit a second diplomatic note, and the court's *per curiam* opinion and order issued this date, it is

ORDERED that the motion be dismissed as moot, as to No. 91-5147. It is

FURTHER ORDERED that the motion be held in abeyance as to the consolidated cases, pending appellants' response to the court's order to show cause.

The Clerk is directed to place a copy of this order in Nos. 91-5139 et al., and in No. 91-5147.

Per Curiam

FOR THE COURT:
Constance L. Dupré, Clerk

By: /s/ Linda Jones
Deputy Clerk

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 91-5147

September Term, 1991
FILED APR 15 1992
90cv01694

Industria Panificadora, S.A., *et al.*,
Appellants

v.

United States of America

BEFORE: Mikva, Chief Judge; Ruth B. Ginsburg and D. H. Ginsburg, Circuit Judges

ORDER

Upon consideration of the petition for rehearing, it is

ORDERED that the petition be denied. In opposing the motion for summary affirmance, appellants expressly disavowed reliance on the Hague Convention as generative of a private right of action separate from the Federal Tort Claims Act; the argument, therefore, is improperly tendered at this late date. *See Bullock v. Mumford*, 509 F.2d 384, 388 (D.C. Cir. 1974) (grounds for reversal not previously placed before the court not considered on petition for rehearing); *Schooler v. Schooler*, 173 F.2d 299, 302-03 (D.C. Cir. 1948) ("fairness to appellees and our obligation to other litigants require that we should not permit this appeal, after it has been presented and lost on one basis, to be presented again on an opposite basis"). Further, no court has held that the Convention supports such a right of action. *See, e.g., Dreyfus v. Von Finck*, 534 F.2d 24, 29-30 (2d Cir.), *cert. denied*, 429 U.S. 835 (1976); *Handel v. Artukovic*, 601 F. Supp. 1421, 1425 (C.D. Cal. 1985). Finally, appellants' challenge to our application of the discretionary function exception is insubstantial.

Per Curiam

FOR THE COURT:
Constance L. Dupré, Clerk

/s/ Robert A. Bonner
By: Robert A. Bonner
Deputy Clerk

U.S. Const. art. II, § 2, cl. 1 Commander in Chief; Reprieves and Pardons

The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States; he may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices, and he shall have Power to grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment.

U.S. Const. art. III, § 2, cl. 1 Jurisdiction of Courts

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

U.S. Const. art. VI, cl. 2 Supreme Law of the Land

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Hague Convention IV, 1907, 36 Stat. 2277, 2290

Article 3. A belligerent party which violates the provisions of the said Regulations shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces.

Hague Convention IV, 1907, Annexed Regulations, 36 Stat. 2277, 2306

Article 42. Territory is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised.

Article 43. The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.

28 U.S.C. § 1346(b) (1976) United States as defendant

Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. § 1350 (1976) Alien's action for tort

The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.

28 U.S.C. § 2674 (1991) Liability of the United States

The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

If, however, in any case wherein death was caused, the law of the place where the act or omission complained of occurred pro-

vides, or has been construed to provide, for damages only punitive in nature, the United States shall be liable for actual or compensatory damages, measured by the pecuniary injuries resulting from such death to the persons respectively, for whose benefit the action was brought, in lieu thereof.

* * *

28 U.S.C. § 2680 (1991) Exceptions [to United States liability]

The provisions of this chapter and section 1346(b) of this title shall not apply to—

(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

* * *

(j) Any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war.

(k) Any claim arising in a foreign country.

* * *

República de Panamá

Panamá, R. de P.

Ministerio de Rolaviones Esleriores
Despacho de Ministro
D. M. No. 678

19 de agosto de 1991

Señor Embajador:

Tengo el honor de dirigirme a Vuestra Excelencia para hacer de su conocimiento los hechos y circunstancias que más adelante se mencionan, con la esperanza de que los problemas planteados como consecuencia de ellos, puedan encontrar una pronta y amístosa solución entre los dos Gobiernos.

Como es del conocimiento de Vuestra Excelencia, el 20 de diciembre de 1989 las Fuerzas de Defensa de Panamá fueron desarticuladas y dispersas rápida y efectivamente por tropas de los Estados Unidos de América, quedando el país sin una fuerza policial apta para mantener la ley y el orden público, ya que las tropas estadunidenses no intentaron en ningún momento asumir estas responsabilidades. Como consecuencia de lo anterior, individuos no identificados realizaron extensos y sustantiales saqueos, pillajes y otras conductas delictivas contra establecimientos comerciales, depositos y de diversa naturaleza, de propiedad de inocentes civiles, dando asi lugar a que los dueños de dichos establecimientos sufrieran pérdidas por millones de dolares, las cuales compañías de seguros por las péridida por algunos comerciantes asegurados han sido rechazados por las aseguradoras por provenir de actos de guerra. Ante esta realidad, a las victimas de las pérdidas a las que he hecho referencia no ha quedado otra alternativa que la de acudir a los tribunales de los Estados Unidos de América, a fin de obtener una compensación justa y equitativa. Entiendo, asimismo, que las acciones judiciales emprendidas se fundamentan en claras disposiciones del Derecho Internacional Público, entre las que se pueden citar la Convención

A Bu Excelencia
Deane R. Hinton
Embajador de los Estados Unidos de American
Panamá.-

de la Haya de 1907 relativa a las Leyes y Costumbres de la Guerra Terrestre.

Sin ánimo de prejuzgar los resultados de tales acciones, a petición de las victimas, solicito muy respetuosamente que el Gobierno de los Estados Unidos de América considere cuidadosamente las razores que motivaron las acciones judiciales que han sido interpuestas, con objeto de que las personas cuyas propiedades fueron destruidas y saqueadas puedan obtener una justa y equitativa compensación.

Confio en poder seguir conversando sobre este asunto con los funcionarios competentes del Gobierno de los Estados Unidos de América y en poder brindar cualquier asistencia, si fuere necesario, que facilite el pago de estas compensaciones.

Aprovecho la oportunidad para reiterar a Vuestra Excelecia las seguridades de mi alta y distinguida consideración.

Julio E. Linares
Ministro

cc.: Excelentísimo Señor Presidente de la República
Sr. Manuel Berrocal
Sr. Nathanial Méndez Goytía
Presidente del Conep

[Translation]

REPUBLIC OF PANAMA

Panama, R of P

The Ministry of Foreign Relations
Note of the Ministry
Ministry Note No. 678

August 19, 1991

Mr. Ambassador:

I have the honor to bring to your Excellency's attention the following issues and circumstances in the hope that the issues raised as a consequence of those circumstances can be brought to a prompt and amiable resolution between our two Governments.

As your Excellency is aware, on December 20, 1989, the defense forces of Panama were quickly and effectively defeated and disbursed by the troops of the United States of America, thereby leaving the country without a police force able to maintain public law and order especially as troops of the United States at no time evidenced any intention of assuming those responsibilities. As a result of the foregoing, unidentified individuals committed extensive and substantial looting, pilferage and other illegal acts against commercial establishments, warehouses, and other privately owned property of innocent civilians thus inflicting upon the owners of these establishments losses in the millions of dollars, which losses in many cases represented the entire life savings of these individuals.

It is my understanding that the claims presented to the insurance companies for the losses suffered by insured businessmen have been declined by the companies based on the act of war ex-

To your Excellency
Deane R. Hinton
Ambassador of the United States of America
Panama

ception. In view of this situation, the victims who suffered the above described losses determined that they had no alternative but to institute actions in the courts of the United States of America in order to try to obtain just and equitable compensation. I also understand that the pending actions are based on clear provisions of public international law, including the 1907 Hague Convention Respecting the Laws and Customs of War on Land.

Without wishing to prejudge the outcome of these actions, I respectfully request, on behalf of the victims, that the United States Government carefully consider the reasons which motivated the filing of the lawsuits, such being to assure that those who suffered the destruction of their property may obtain just and equitable compensation.

I count on being able to communicate with appropriate officials of the United States Government concerning this matter and to provide whatever assistance may be necessary to facilitate the payment of such compensation.

I take this opportunity to reiterate to your Excellency the assurances of my high and distinguished consideration.

/s/ Julio E. Linares
Julio E. Linares
Minister

cc: His Excellency the President of the Republic
Sr. Manual Berrocal
Sr. Nathaniel Mendez Goytia
President of Conep

República de Panamá

Panamá, R. de P.

Ministerio de Relaciones Exteriores
Despacho del Ministro
D.M. No. 050

21 de enero de 1992

Señor Embajador:

Nuevamente tengo el honor de dirigirme a Vuestra Excelencia para referirme a la situación de las personas, nacionales o extranjeras residentes en Panamá, cuyos establecimientos comerciales y propiedades fueron saqueadas, dañadas o destruidas durante los sucesos de finales del mes de diciembre de 1989.

En mi nota D.M. No. 678, tuve el honor de relatar a Vuestra Excelencia algunos hechos concernientes a estas desafortunadas personas: Que el 20 de diciembre de 1989, tropas de los Estados Unidos de América destruyeron y dispersaron a las antiguas Fuerzas de Defensa de Panamá; que, como resultado de lo anterior. Panamá estuvo, durante un lapso o periodo de tiempo, sin una fuerza de policía local que le permitiera mantener la ley y el orden; y que, debido a la ausencia de tal fuerza de policía, en los días que siguieron a la invasión hubo un resquebrajamiento total del orden público, que condujo a circunstancias en que vándalos no identificados saquearon y robaron, y en alguna otra forma dañaron o destruyeron los establecimientos comerciales, depósitos o bodegas y otras propiedades pertenecientes a inocentes civiles de mi país.

En mi nota antes aludida, también describí a Vuestra Excelencia los esfuerzos que realizan algunas de estas victimas inocentes, ante los Tribunales de los Estados Unidos de América, para obtener una justa y equitativa compensación por los daños y perjuicios sufridos, conforme a las normas y principios del Derecho Internacional Público, incluyendo las disposiciones contenidas en la Convención de La Haya de 1907 relativa a las Leyes y

Se Excelencia
Deane R. Hinton
Embajador de los Estados Unidos de América

Costumbres de la Guerra Terrestre. Sin deseos de prejuzgar los resultados de estas acciones legales, respetuosamente solicito por Vuestra digno conducto que el Ilustrado Gobierno de los Estados Unidos de América considere cuidadosamente las razones que motivaron la presentación de tales acciones, a fin de asegurar que una compensación justa y equitativa pueda obtenerse para aquéllos que sufrieron daños o destrucción a sus propiedades.

Mi Gobierno ha sabido que recientemente en los juicios que se tramitan ante los Tribunales estadounidenses, el Gobierno de los Estados Unidos de América ha expresado la opinion que es necesario que el Gobierno de Panama solicite que sean aplicadas las disposiciones contenidas en la Convención de La Haya de 1907, a fin de que los reclamos de estos cuidadanos sean considerados. En vista de lo anterior, tengo el honor de notificar a Vuestra Excelencia, en nombre de las personas y de los ciudadanos de mi País, cuyas propiedades fueron dañadas o destruidas, que es el deseo del Gobierno de Panama que la Convención de La Haya de 1907 sea aplicada en y por los tribunales de los Estados Unidos de América. de la misma manera como se aplican localmente todas las normas del Derecho Internacional Público por los Estados que han contribuido a su formación o se han adherido a él.

Mi Gobierno reitera que no desea prejuzgar los resultados de ningún juicio en particular. Sin embargo, en la medida en que los reclamantes puedan individualmente demostrar que sufrieron daños o perjuicios que la Convención de la Haya de 1907 intentó impedir, nuevamente, con todo respeto, solicito que esos reclamos reciban una consideracion justa e imparcial en y por los Tribunales de los Estados Unidos de América.

Debido al gran número de tales reclamos y a la multiplicidad de los diferentes daños y perjuicios sufridos, mi Gobierno no tiene objección a que los individuos perjudicados procedan por su propia cuenta, como ocurre, por ejemplo, con respecto a los reclamos de que trata la Convención de Varsovia de 1929 relacionada al Transporte Aéreo Internacional. Mi Gobierno también cree que bajo estas circunstancias únicas, los tribunales civiles están calificados para evaluar las pruebas concernientes a las perdidas, daños y perjuicios ocasionados a las propiedades que los reclamantes presentarán.

Mi Gobierno agradecerá que Vuestra Excelencia presente estos puntos de vista a la atención de los Tribunales y/u otros organis-

mos judiciales o administrativos de los Estados Unidos de América, ante los cuales acciones o demandas han sido presentadas y se tramitan en la actualidad.

Aprovecho la opportunidad para renovar a Vuestra Excelencia las seguridades de mi alta consideración.

/s/ Julio E. Lineares
Julio E. Linares
Ministro

REPUBLIC OF PANAMA

Panama, R. of P.

Ministry of Foreign Affairs
Office of the Minister
D.M. No. 050

January 21, 1992

Mr. Ambassador:

I again have the honor to address myself to your Excellency concerning the circumstances of citizens of my country or foreigners residing in Panama whose commercial establishments and property were looted, damaged, or destroyed during the events of late December 1989.

In my Note No. 678, I had the honor of relating to Your Excellency some of the facts concerning these unfortunate individuals: that on December 20, 1989, troops of the United States of America defeated and dispersed the former defense forces of Panama; that, as a result of the foregoing, Panama was, for a considerable period, without any indigenous police force able to maintain public law and order; and that, because of the absence of such a police force, in the days following the invasion, there was a total breakdown of public order, leading to circumstances where unidentified vandals looted and pilfered property from, and otherwise damaged or destroyed, the commercial establishments, warehouses and other property owned by these innocent civilians of my country.

In my aforementioned note, I also described for your Excellency the efforts of certain of these innocent victims before the Courts of the United States of America, to obtain just and equitable compensation for their injuries in accordance with and pursuant to prevailing principles of public international law, including the 1907 Hague Convention Respecting the Law and Customs of War. Without wishing to prejudge the outcome of these legal actions, I

Your Excellency
Dean R. Hinton
Ambassador to the United States of America

respectfully request that the Government of the United States of America carefully consider the reasons which motivated the filing of those actions in order to assure that some just and equitable compensation might be obtained by those who suffered damage to or destruction of their property.

My Government has learned that recently in the Court proceedings pending before the Courts of the United States, the Government of the United States of America has expressed the view that it is necessary for the Government of Panama to request enforcement of the provisions of the 1907 Hague Convention in order for these citizens' claims to be considered. In view thereof, I have the honor to advise your Excellency that, on behalf of the persons and citizens of my country whose property was so damaged or destroyed, it is the desire of the Government of Panama that the 1907 Hague Convention be applied in and by the courts of the United States in the same manner as all public international laws are adhered to and enforced by their signatory nations.

My Government emphasizes that it does not wish to prejudge the outcome of any particular proceeding. However, insofar as individual claimants are able to establish that they suffered damage or injury which the 1907 Hague Convention was intended to prevent, we again respectfully request that those claims be given fair and impartial consideration in and by the Courts of the United States of America.

Because of the large number of these claims, and the multiplicity of different injuries, my government does not object to the injured individuals proceeding on their own behalves, as is the case, for example, with respect to claims under the Warsaw Convention of 1929 Relating to International Transportation by Air. My Government also believes that in these unique circumstances civil courts are best equipped to evaluate the proofs of loss, damage and injury to property that claimants such as these will present.

My Government would appreciate if Your Excellency would bring these views to the attention of the courts and/or other judicial or administrative bodies of the United States of America where these law actions have been filed and are now pending.

I take this opportunity to reiterate to your Excellency the assurances of my high and distinguished consideration.

Julio E. Linares
Minister

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

INDUSTRIA PANIFICADORA, S.A.,) INMOBILIARIA SANTA ANA, S.A.,) and F.X. VIDEO CLUB, S.A.,) Ave. A) El Dorado, Panama) Republic of Panama,)) F.X. VIDEO CLUB, S.A.) Ave. 7ma. Norte Y Calle 63 Este) Urb. Los Angeles, Panama) Republic of Panama,) Plaintiffs,) vs.) UNITED STATES OF AMERICA,) Defendant.))	CAUSE NO. 90 1694

AMENDED COMPLAINT

COMES NOW the Plaintiffs, by and through undersigned counsel, to sue the Defendant, the UNITED STATES OF AMERICA, as follows:

I
JURISDICTION AND VENUE

(1) This action arises under the Federal Tort Claims Act, Sections 2671 through 2680 of Title 28 of the United States Code, 28 U.S.C. Sections 2671-2680, and under the Alien Tort Claims Act, Section 1350 of Title 28 of the United States Code, 28 U.S.C. Section 1350. This court is vested with jurisdiction prusuant to Section 1346(b) of Title 28 of the United States Code, 28 U.S.C. Section 1346(b).

(2) The Plaintiffs are corporations organized and existing under the laws of the Republic of Panama, with their principal places of business in Panama City, Panama. The acts and omissions complained of occurred in the District of Columbia.

II
COMMON ALLEGATIONS

(3) On or about the 20th day of December, 1989, armed forces of the United States of America occupied, pacified and controlled an area of the City of Panama, Republic of Panama, in which were located buildings and businesses belonging to the Plaintiffs (the "Occupied Zone"), and such occupation and control continued until approximately January 10, 1990 ("the Period of Occupation").

(4) During the Period of Occupation, and as a result of the occupation, pacification and control by the armed forces of the United States of America of this area in the City of Panama, the Panamanian police force, known as the Panamanian Defense Force, completely collapsed and was prevented from carrying out its police duties by the actions of the armed forces of the United States of America. As a consequence, during the Period of Occupation the armed forces of the United States of America owed a duty to the Plaintiffs and to all the other Panamanian residents and businesses in the Occupied Zone of maintaining public law and order.

(5) The Defendant breached this duty of maintaining law and order in the Occupied Zone for the Period of Occupation by negligently failing to provide adequate numbers of police personnel, equipment and orders to protect the residents and businesses in the Occupied Zone from looting and pillaging by civilian members of the Panamanian population. The Plaintiffs' businesses were looted, burned and destroyed by civilian members of the Panamanian population during the Period of Occupation, causing the Plaintiffs extensive damage.

(6) The Plaintiffs' damages were a direct and foreseeable consequence of the Defendant's negligent omission in the District of Columbia to provide personnel, material and orders to the armed forces of the Defendant during the Period of Occupation and in the Zone of Occupation to maintain the public order as was the Defendant's duty.

III
DAMAGES
INDUSTRIA PANIFICADORA, S.A.
INMOBILIARIA SANTA AN[A], S.A.

(7) The Plaintiffs adopt by reference Paragraphs 1-6 of this Amended Complaint.

(8) As a direct and proximate result of the Defendant's negligence, The Plaintiffs, INDUSTRIA PANIFICADORA, S.A. and INMOBILIARIA SANTA ANA, S.A., suffered damages in the amount of $1,200,000.

(9) On January 17, 1990, The Plaintiffs, INDUSTRIA PANIFICADORA, S.A. and IMMOBILIARIA SANTA ANA, S.A., submitted a claim based on the allegations herein to the Department of State.

(10) On January 22, 1990, the claim was rejected by the Department of State, and on February 7, 1990 by the Department of the Army.

IV
DAMAGES
F.X. VIDEO CLUB, S.A.

(11) The Plaintiff adopts by reference Paragraphs 1-6 of this Amended Complaint.

(12) As a result and proximate result of the Defendant's negligence, the Plaintiff, F.X. VIDEO CLUB, S.A., suffered damages in the amount of $306,823.

(13) On January 12, [1]990, the Plaintiff F.X. VIDEO CLUB, S.A., submitted a claim based on the allegations herein in the amount of $306,823 to the Department of State.

(14) On January 22, 1990, the claim was rejected by the Department of State.

WHEREFORE, the Plaintiffs request judgment against the Defendant;

(A) For damages in the amount of $1,506,823;

(B) For costs of suit;

(C) For legal interest; and

(D) For such other and further relief as may be just and proper.

/s/ Douglas B. McFadden
Douglas B. McFadden, Esq.
D.C. Bar No. 151761

/s/ William D. Goddard
William D. Goddard, Esq.
D.C. Bar No. 231779

McFadden, Evans & Sill
1220 19th Street, N.W.
Suite 501
Washington, D.C. 20036
(202) 293-0700

Attorneys for Plaintiffs